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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may, consistent with the Equal Protection Clause as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist., No. 1*, 458 U.S. 457 (1982), selectively divest the political branches of local and state government of their traditional authority to enact race- or sex-based "preferential treatment" that is otherwise constitutionally permissible, while leaving these governmental entities free to enact and enforce all other preferences.

2. Whether a statewide initiative foreclosing state legislatures, executive agencies, and courts from granting "preferential treatment" that is closely tailored to remedying discrimination against women and minorities contravenes this Court's holding in *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996), that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

3. Whether a statewide initiative banning race- and sex-based "preferential treatment" violates the Supremacy Clause, by standing as an obstacle to Title VII's objective of promoting voluntary affirmative action to remedy past discrimination.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs/Appellees below):

Coalition for Economic Equity
California NAACP
Northern California NAACP
California Labor Federation, AFL-CIO
Council of Asian American Business Associations, California
Chinese American Citizens Alliance
Women Construction Business Owners and Executives, California Chapter
United Minority Business Entrepreneurs
Chinese for Affirmative Action
Black Advocates in State Service
Asian Pacific American Labor Alliance
La Voz Chicana
Black Chamber of Commerce of California
Michelle Bennett
Nancy Burns
Floyd Chavez
Christopher Clay
Dana Cunningham, through his next friend Diana Gronert
Iran Celeste Davila
Shevada Dove, through her next friend Melodie Dove
Jessica Lopez
Virginia Mosqueda
Salvador Ochoa
Clifford Tong

PARTIES TO THE PROCEEDING

Respondents (Defendants/Appellants below):
Pete Wilson, Governor of the State of California
Daniel E. Lungren, Attorney General for the State of California
Joanne Corday Kozberg, Secretary of State and Consumer Services Agency of the State of California
James H. Gomez, Director of the California Department of Corrections

Respondent (Defendant-Intervenor/Appellant below):
Californians Against Discrimination and Preferences

Respondents (Defendants below):
Richard Atkinson, President of the University of California
Delaine Eastin, Superintendent of Public Instruction of the State of California
City and County of San Francisco
County of San Diego
County of Contra Costa
County of Marin
City of Pasadena

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The opinion of the Court of Appeals for the Ninth Circuit, filed April 8, 1997, is reported at 110 F.3d 1431. (Appendix A.) This opinion reversed an order of the United States District Court for the Northern District of California, filed December 23, 1996, which granted plaintiffs' motion for a preliminary injunction. The district court's opinion and order are reported at 946 F. Supp. 1480. (Appendix B.) On August 21, 1997, the court of appeals entered an order amending the April 8, 1997 opinion, denying the petition for rehearing, and rejecting the suggestion for rehearing en banc. (Appendix C.) On August 26, 1997, the court of appeals entered an order denying plaintiffs-appellees' motion for a stay of mandate pending petition for certiorari. (Appendix D.) On August 28, 1997, the court of appeals issued two opinions dissenting from the denial of rehearing en banc, authored by Judge Schroeder (joined by Judges Pregerson, Norris and Tashima) and Judge Norris (joined by Judges Schroeder, Pregerson, and Tashima), as well as an opinion by Judge Hawkins commenting on the denial of rehearing en banc. (Appendix F.)

JURISDICTION

The Ninth Circuit Court of Appeals' opinion was entered on April 8, 1997, and the order amending the opinion and denying the petition for rehearing was entered on August 21, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution
Title VII of the Civil Rights Act of 1964
42 U.S.C. sec. 1983
California Constitution, art. I, sec. 31 (Proposition 209)
(Appendix E.)

STATEMENT OF THE CASE

This case presents the issue whether the people of a state may by initiative strip state and local governmental entities of their previous power to enact or enforce constitutionally permissible "preferential treatment" on the basis of race or sex. The district court held that such a measure violates the Equal Protection Clause as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), which applied the strictest scrutiny to laws that "remove[ ] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. In both cases, this Court struck down voter-enacted initiatives that "plac[ed] unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice." *Id.* at 486. The Court of Appeals for the Ninth Circuit reversed in an opinion that raises important, novel and difficult questions for equal protection and supremacy jurisprudence. This petition respectfully requests the Court to exercise its certiorari jurisdiction in order to settle these questions.

1. Proposition 209

Proposition 209 is an initiative that amends Article I of the California Constitution to provide: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const., art. I, sec. 31(a).[1]

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[1] California voters approved the measure by a margin of 54-46%, with a majority of males and whites voting in favor, and a majority of women, African-Americans, Latinos and Asians voting in opposition. The racial and gender breakdown of the vote was as follows:

This constitutional amendment applies not only to state agencies, but also to "any city, county, city and county, public university system, including the University of California, community college district, school district, special district or any other political subdivision or governmental instrumentality of or within the state." Cal. Const. Art. I, § 31(f). Proposition 209 applies to state and local legislatures, state and local executive agencies, and state courts. The measure extends not only to those race- or sex-based preferences independently forbidden by the United States Constitution or federal statute, but also to those race- or sex-based preferences that are wholly permissible under federal law. Indeed, Proposition 209 makes no exception even for those race- or sex-based preferences that are required by federal law. It provides a narrow exception for those preferences mandated by a "court order or consent decree which is in force as of the effective date," *id.* § 31(d), but not for any preferences mandated by a court order issued thereafter.

To the extent that Proposition 209 bans "discriminat[ion]" on the basis of race, sex, color, ethnicity, or national origin, it is merely redundant of existing state and federal antidiscrimination law. As the district court concluded, and the court of appeals did not dispute, "this language simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act." *Coalition for Economic Equity ("CEE") v. Wilson*, 946 F. Supp. 1480, 1488 (N.D.Cal. 1996).

VOTER	YES(%)	NO(%)
Male	61%	39%
Female	48%	52%
White	63%	37%
Black	26%	74%
Latino	24%	76%
Asian	39%	61%

Coalition for Econ. Equity v. Wilson, 946 F.Supp. 1480, 1495 n.12 (N.D. Cal. 1996) (citing Pinkus decl. (*L.A. Times* poll)).

This language, accordingly, has never been at issue in this case.

The only issue in this case is the constitutionality of 209's ban on "preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin." It is beyond dispute that the sole reason for passage of Proposition 209 was to eliminate various otherwise constitutional affirmative action programs that benefit racial minorities and women. That is how 209 was described by its proponents and how it was characterized in the official ballot materials distributed to California voters.[2] Given that the rest of its mandate is merely duplicative of pre-existing law, that is Proposition 209's only conceivable objective.

While Proposition 209 eliminates pre-existing state and local discretion to enact race- and sex-based preferences in public employment, education and contracting – no matter how permissible or compelling the reason – it leaves intact state and local governments' pre-existing discretion to adopt any other preferences in those areas. For example, Proposition 209 leaves public universities free to grant admissions preferences based on applicants' geographical origin or the

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[2] For example, the Yes/No Statement prepared by the nonpartisan Legislative Analyst's Office, and published in the official pamphlet sent to all voters, states:

> A YES vote on this measure means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, national origin.
>
> A NO vote on this measure means: State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

Pls. Exh. 2, Legislative Analyst Office's "Yes/No" Statement, published in the Official Ballot Pamphlet; *see also* Pls. Exh. 3, Arguments for and against Proposition 209, published in the Official Ballot Pamphlet.

fact that they are children of alumni, donors, or friends of university officials.[3] Municipalities are free to grant hiring preferences to veterans or those with close political ties to local officials. All units of government may give contracting preferences to favored industries or businesses with powerful lobbyists. The only change in California law effected by Proposition 209 is to eliminate race- and sex-conscious programs that were permissible under pre-existing law.

2. Proceedings Below

a. District Court

Plaintiffs brought this action in the United States District Court for the Northern District of California, which had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) & (4). Plaintiffs consisted of the class of participants in race- and sex-based affirmative action programs all across California. On December 23, 1996, the district court issued a preliminary injunction barring enforcement of 209, but expressly

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[3] Non-merit-based preferences in the area of education are not uncommon, and inure mostly to the detriment of minorities. For example, a recent survey of acceptance of students at the nation's law schools for the 1990-91 application year demonstrated that of 42,287 white students accepted, 6,321 (12.6%) were not predicted to be admitted by application of LSAT scores and undergraduate grade point averages. Linda F. Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions," 72 *NYU L.R.* 1, 16-17 (1997); *see also* Ralph Frammolino et al., "UCLA Eased Entry Rules for the Rich, Well-Connected," *LA Times*, Mar. 21, 1996 at A-1 (reporting that chancellor and top aides gave back-channel admissions help to friends and relatives of donors, and that 75 privileged students were admitted while hundreds of others with better grades and higher SAT scores were denied). *See generally* Susan Sturm & Lani Guinier, "Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming the Innovative Idea," 84 *Calif.L.Rev* 953, 995-97 (1996) (collecting studies).

leaving each state and local governmental entity free "to voluntarily adopt, retain, amend, or repeal an affirmative action program." *CEE*, 946 F. Supp. at 1520-21 & n.53.

The district court found that the change in law effected by Proposition 209 is to "close th[e] narrow but significant window" left open by this Court within which "preferential treatment" based on race or sex is permissible when necessary to serve important governmental interests. *Id.* at 1489. Relying on a voluminous evidentiary record, the district court found that Proposition 209 would forbid enactment or enforcement of a "range of affirmative action programs currently in effect in California," including "[s]ome . . . programs [that] have been subjected to judicial challenge and found to be constitutionally permissible." *Id.* at 1495 n.16.

Specifically, the district court found that Proposition 209 would prevent enactment and enforcement of such race- and sex-conscious public education measures as "voluntary desegregation and 'magnet school' programs." *Id.* at 1493-94, 1497.[4] Proposition 209 would also affect a variety of programs at the public university level, including admissions, financial aid, counseling, and tutoring. *Id.* at 1494, 1497-98. In public contracting, the initiative would preclude state and local government measures narrowly tailored "to address the continuing effects of past or present bias against the use of women- and minority-owned contractors on public sector projects." *Id.* at 1496. Finally, in public employment, Proposition 209 would eliminate narrowly tailored affirmative action "designed to address the continuing effects of past or present bias against the hiring and/or promotion of women and minority employees" and thereby "substantially reduce opportunities for women and minorities. . . . " *Id.* at 1496-97 & n.17.

---

[4] As stated in the official ballot pamphlet analysis by the non-partisan Legislative Analyst's Office and studies performed by the State Senate Office of Research, the 1994-95 state budget included $122.1 million in General Fund support for voluntary race-based desegregation programs in 46 school districts, involving hundreds of thousands of students.

Based on these findings, the district court concluded that plaintiffs had demonstrated a probability of success on their claim that Proposition 209 violates the Equal Protection Clause of the Fourteenth Amendment as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1* ("*Seattle*"), 458 U.S. 457 (1982). The court found that Proposition 209 "effectively precluded" racial minorities and women "from petitioning local and state policymakers and representatives to adopt, maintain or expand race- or gender-conscious affirmative action programs." *CEE*, 946 F. Supp. at 1499. Those seeking race- or sex-conscious remedies for discrimination "must first mount a statewide campaign to amend the state constitution, while those seeking preferential treatment on all other grounds need not surmount any new political hurdle." *Id.* at 1506. The district court therefore applied this Court's holding in *Seattle*, which struck down a Washington state initiative proscribing racially integrative school busing, on the ground that it denied minorities equal political access. The district court concluded that, just like the *Seattle* initiative, Proposition 209 unconstitutionally " 'removes the authority to address **a racial problem** – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests,' " *id.* at 1505 (quoting *Seattle*), and that the selective withdrawal of political discretion over a "gender problem" was likewise unconstitutional under the reasoning of *Hunter* and *Seattle*. *Id.* at 1501, 1510.

Finally, the district court found a likelihood of success on the merits of the claim that Proposition 209, to the extent that it bars any voluntary affirmative action in public sector employment, is preempted by Title VII of the Civil Rights Act. *Id.* at 1510-17.

b. Court of Appeals

The Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), reversed and vacated the preliminary injunction. Without disturbing the

district court's findings as to the initiative's scope,[5] the court of appeals held that the district court had abused its discretion in applying the *Hunter-Seattle* principle to Proposition 209. Likening Proposition 209 to the law at issue in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which upheld a state constitutional amendment repealing a previous state constitutional mandate to remedy *de facto* segregation through race-based busing, the court of appeals asserted that "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." 110 F.3d at 1446 (quoting *Crawford*, 458 U.S. at 535). The court of appeals also attempted to distinguish the race- and sex-conscious programs at issue here from the race-conscious busing programs at issue in *Seattle*. Specifically, the court of appeals held that Proposition 209 barred "preferential treatment" that "deprive[s] citizens of rights," while the *Seattle* initiative barred "reshuffle" programs that did not deprive other citizens of rights. *Id.* at 1445 & n.16.[6]

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[5] As stated in the district court's opinion: "[D]efendants agreed at oral argument that Proposition 209 prohibits some of these constitutionally permissible programs. They also failed to identify any other programs [other than race- and gender-conscious affirmative action] that would be affected by Proposition 209." 946 F. Supp. at 1489. The court of appeals expressly stated its agreement with the district court's conclusion that 209 targets race- and sex-based "preferential treatment" that had been permissible under pre-existing law, and noted that "the State does not dispute that Proposition 209 operates to eliminate such programs." 110 F.3d at 1437-38.

[6] The court of appeals considered but declined to find significance in the fact that Proposition 209 erects political obstacles to both race- *and* sex-conscious programs, while *Seattle* invalidated political obstacles solely to programs that took account of race. 110 F.3d at 1441-42. In considering whether the political restructuring cases applied at all to burdens placed on women, the court of appeals remarked: "The Supreme Court leaves us, quite frankly, a little perplexed as to the answer." *Id.* at 1444.

The court of appeals also held that Title VII did not preempt Proposition 209's bar on affirmative action in public employment. The court of appeals did not mention Title VII's purpose of encouraging voluntary remedies for official discrimination, or acknowledge this Court's holding that voluntary race- and sex-conscious programs play a "crucial role in furthering Title VII's purpose." *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987). Instead, the court of appeals concluded that Proposition 209's blanket ban on race- and sex-conscious programs was perfectly consistent with – and indeed mirrored – the purposes and provisions of Title VII. *Id.* at 1446-48.

REASONS FOR GRANTING THE WRIT

1. The issue of how much flexibility state and local governments have to enact and enforce race- and sex-conscious preferences that are permitted or required by the federal Equal Protection Clause is one of fundamental and nationwide social and political significance.

The issue whether states and localities may deliberately give preferences to racial minorities and women in such areas as education, employment and contracting has sharply divided the nation and this Court for more than a generation. This Court has held that some such preferences are forbidden by the Equal Protection Clause. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). And yet this Court has also plainly stated that some such preferences are constitutionally permissible, and indeed, in some narrow circumstances, even constitutionally required. The Court has thus explicitly left open a window for state and local enactment and enforcement of some but not other race- and sex-based preferences. It is this "narrow but significant window," 946 F. Supp. at 1489, that Proposition 209 seeks not only to close but to lock shut.

a. Race. This Court has stated that race-based preferences are constitutionally permissible when narrowly tailored

to redress past race discrimination against racial minorities.[7] The Court has noted that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Contractors Inc. v. Pena*, 515 U.S. 200, 237 (1995).

Indeed, this Court has repeatedly recognized that state and local entities not only have a compelling interest, but sometimes even a constitutional obligation, to institute race-conscious remedies for past discrimination.[8] As Justice Kennedy has put it: "[T]he State has the power to eradicate racial

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[7] The Court has also suggested that nonremedial purposes may sometimes justify race-based preferences. For example, Justice Powell's pivotal opinion in *Regents of the University of California v. Bakke* acknowledged that achieving racial diversity in an academic class would be a "compelling" justification for the use of race as a factor in public university admissions. 438 U.S. 265, 311-15 (1978); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

[8] *See, e.g, United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality) (noting that "[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor") (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274 (1986) (opinion of Powell, J.) and *id.* at 286 (O'Connor, J., concurring) ("remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program")); *see also Stuart v. Roache*, 951 F.2d 446, 449 (1st Cir. 1991) (Breyer, C.J.). In the area of school segregation, the Court has repeatedly held that school districts bear the "duty and responsibility" to eradicate the effects of *de jure* segregation. *Freeman v. Pitts*, 503 U.S. 467, 485 (1992); *see also United States v. Fordice*, 505 U.S. 717, 728 (1992) (state has obligation to "eradicate[ ] policies and practices traceable to its prior de jure dual system that continue to foster segregation" of

discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring); *see also Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (recognizing the importance of affirmative action in governments' efforts "to meet voluntarily their civil rights obligations"). Such an affirmative remedial duty might sometimes require the use of racial preferences, for example, where "necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509.

The affirmative duty on the part of state and local governments to employ race preferences is a narrow one, applicable only in those limited circumstances where a court would order it as a remedy for identifiable and unconstitutional past or present discrimination. Where a court would properly order such a constitutional remedy, the political branches of the relevant government surely have an identical constitutional obligation to remedy their own wrong – even before any plaintiff reaches the courthouse door. As Justice Kennedy has stated, "evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring); *see Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) ("Those myriad factors [of human existence which can cause discrimination in a multitude of ways on racial grounds] are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice.").

Yet this Court has also mapped out an additional area in which voluntary race-conscious measures are permissible, even if not constitutionally required. Neither *Croson* nor

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higher education); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437 (1968) (school districts responsible for segregation must remove vestiges "root and branch").

Adarand suggests that the political branches must limit themselves to adopting **only** those race-based preferences that would be ordered as a constitutional remedy by a court. To the contrary, both decisions recognize that state and local governments require a certain amount of breathing room if they are to carry out their duty to rectify past discrimination. Accordingly, while subjecting race-based preferences to strict scrutiny, this Court has sought explicitly to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Adarand*, 515 U.S. at 237 (citation omitted).

Under such strict but not fatal scrutiny, this Court has recognized, governments may adopt race preferences that are narrowly tailored to redress specifically identified past discrimination – even if that discrimination was not committed intentionally by the state, and even if the scope of the redress is not limited to the individual victims of adjudicable discrimination. For example, while *City of Richmond v. J.A. Croson Co.* struck down a particular contracting preference for minority-owned business enterprises, the Court took pains to note that "[n]othing we say today precludes a state or local entity from taking action" – including race-conscious action – "to rectify the effects of identified discrimination **within its jurisdiction**," 488 U.S. at 509 (emphasis added), whether or not that past discrimination was committed intentionally by the state. Indeed, as Justice O'Connor wrote elsewhere in her *Croson* opinion, it might well be constitutionally permissible for a city or state entity to engage in race-conscious procurement policies where it had merely been a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry," rather than a deliberate practitioner of racial exclusion itself. *Id.* at 492 (O'Connor, J., joined by Rehnquist, C.J. and White, J.).

Likewise, the Court specifically noted in *Croson* that, "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion," *id.* at 509, whether or not such preferences were limited to making particular victims of adjudicable discrimination whole. Indeed, Justice Scalia concurred separately in both *Croson* and *Adarand* to emphasize his disagreement with the Court to the extent it authorized race-

conscious measures extending beyond remediation for "identified victims of discrimination." *Croson*, 488 U.S. at 526 (Scalia, J., concurring in judgment); *see also Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in the judgment).

This limited but real breathing room the Court has afforded for race-conscious measures that are constitutionally permissible but not constitutionally required has had immense practical importance. It has enabled state and local governments to escape an otherwise impossible dilemma. If race- and sex-based preferences had been limited, as Justice Scalia has proposed, to remedial measures benefitting solely the adjudicated victims of past discrimination, then a state or locality trying conscientiously to do its constitutional duty to eradicate past discrimination would be vulnerable to litigation by whites to the extent it erred by overestimating the extent of its past wrongdoing. But if such governments erred instead on the side of underestimating the extent to which they were guilty of intentional discrimination, then they would be vulnerable to lawsuits brought by racial minorities.

This Court has long acknowledged the difficulty of this dilemma for state and local governments. As Justice O'Connor has warned: "[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action **is not** taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action **is** taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring); *see also Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring) (noting that "this Court has long emphasized the importance of voluntary efforts to eliminate discrimination").

As a practical matter, the limited flexibility accorded by the "strict but not fatal" standard of *Croson* and *Adarand* provides the only sure solution to this dilemma. States and localities may adopt limited race preferences to redress past race discrimination, so long as they identify particular patterns of discrimination that they have either effected, facilitated, or merely negligently tolerated, and so long as they tailor preferential measures narrowly to eradicating that discrimination. In doing so, they gain prophylactic protection

against lawsuits by minorities without being subject to lawsuits by whites. State and local governments have availed themselves of this breathing room and enacted and maintained race-based preferences – even after *Croson* and *Adarand* – when they found such preferences necessary to eradicate the lingering effects of past discrimination,[9] and found that no race-neutral alternatives were adequate substitutes.[10]

b. Sex. As with race-based preferences, this Court has upheld sex-based preferences upon a substantial showing of remedial purpose,[11] and has demarcated a zone in which affirmative action for women is consitutionally permissible even if not constitutionally required. Indeed, the Court has given government greater latitude to adopt voluntary sex-based preferences designed to remedy past discrimination than it has with respect to race-based preferences. To be sure, the Court has struck down those sex-based preferences that do nothing more than embody "archaic and overbroad generalizations" about the respective roles of men and women. But it has readily upheld those sex-based preferences that serve the "important governmental objective" of "compensat[ing]

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[9] "Defendants have not questioned the substantial evidence before the Court showing that women and minorities continue to face the effects of past and present discrimination and thus will continue to have an interest in using the political process to seek remedial action through affirmative action programs." 946 F. Supp. at 1498 n.20.

[10] *See* Janice Franke, "Defining the Parameters of Permissible State and Local Affirmative Action Programs," 24 *Golden Gate U. L. Rev.* 387 (1994) (comparing race-based affirmative action programs that have failed the *Croson* standard with those that have survived); David Joseph, "Statistical Evidence of Discrimination and Affirmative Action: The Numbers Game," 67 *Temple L. Rev.* 451 (1994) (same).

[11] As with race, this Court has suggested that nonremedial purposes might sometimes be independently sufficient to justify sex-based preferences. For example, only two Terms ago, the Court acknowledged that diversity in educational offerings might justify sex-based preferences in public school admissions. *See United States v. Virginia*, 116 S. Ct. 2264, 2276 n.7 (1996).

women for past . . . discrimination." *Califano v. Webster*, 430 U.S. 313, 317-18 (1977). For example, this Court in *Webster* upheld a Social Security provision allowing women to discount more low-earning years than similarly situated men in calculating their retirement payouts, reasoning that Congress had adequately demonstrated that women had been "unfairly hindered from earning as much as men" in the first place. *Id.* at 318.

Sex-conscious measures adopted by states and localities are likewise plainly permissible if shown to be substantially related to the achievement of such important governmental objectives as remedying past discrimination. *See, e.g., United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). And, just as the states and localities have availed themselves of the breathing room left open by this Court to enact voluntary race-conscious measures designed to eradicate the effect of past race discrimination, so they have enacted sex-based preferences in order to eradicate the effects of past discrimination against women.

c. Proposition 209. Proposition 209 seeks to lock shut the window for state and local action that decisions such as *Croson* and *Webster* have so painstakingly left open. Proposition 209 is sweepingly broad in scope.

First, Proposition 209 by its terms bars race- and sex-based preferences across the board, making no allowance even for those preferences that a state court would otherwise order as remediation for adjudicated violations of state constitutional or statutory antidiscrimination law. The exception in § 31(d) applies only to court orders in effect at the effective date of the amendment, not to any court orders thereafter.[12]

Second, Proposition 209 by its terms bars state and local legislative and executive bodies from adopting even those race- and sex-based preferences that they believe are constitutionally required in order to remedy past discrimination that

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[12] Proposition 209 does not even make an exception for race- or sex-based preferences ordered by a federal or state court as remediation for discrimination against racial minorities or women under federal law. Such court orders, however, would of course displace Proposition 209 under the Supremacy Clause.

they have intentionally practiced or aided and abetted. To be sure, Proposition 209 leaves women and minorities free to sue these governments under federal law and to seek race- or sex-based preferences as a remedy. But it thus works a rearrangement of the structural prerogatives of our federal system, in effect transferring discretion to correct discrimination in the areas of education, contracting, and employment from state governments, including state courts, to the federal judiciary. Such a transfer is unprecedented and utterly out of keeping with a system that relies for enforcement of the Constitution on the political branches as well as the courts, and on state no less than federal officials.

Third, Proposition 209 bars the narrow but significant range of race- and sex-based preferences that, even if not constitutionally required, are constititutionally permissible under the "strict but not fatal" standard set forth in *Croson* and the "exceedingly persuasive" standard reiterated in *Virginia*. Such voluntary preferences, of course, need never be enacted in the first place; and if they are enacted, they may readily be repealed by the enacting entity. But Proposition 209 eliminates the breathing room that this Court's precedents have afforded state and local governments even to consider enacting such preferences. It thus places state and local government on a knife's edge: overestimate the extent of intentional past discrimination, and be liable to a successful suit by whites or men under Proposition 209; underestimate it, and be equally open to successful litigation by minorities and women under federal law.

If this Court lets the Ninth Circuit's ruling stand, these sweeping effects on state and local race and sex preferences will rapidly multiply nationwide. Measures similar to Proposition 209 have already been proposed in at least 26 states, and petition drives have begun in a number of them. *See* Sam Howe Verhovek, "After the Election: Policy Momentum Shifts; Vote in California is Motivating Foes of Anti-Bias Plans," *N.Y. Times*, Nov. 10, 1996, at 1; Terry Eastland, "Formula 209; Others Adopt the Language that Won in California," *American Spectator*, Jan. 1997, at 58, 59. Thus a decision whether the court below correctly upheld Proposition 209 is of vital political and social significance to the nation.

2. This Court should resolve whether the decision below is consistent with the holdings of *Hunter v. Erickson* and *Washington v. Seattle School Dist. No 1.*

Nearly three decades ago, this Court held that a state law violates the Equal Protection Clause when it "mak[es] it more difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest." *Hunter v. Erickson*, 393 U.S. 385, 395 (1969). In *Hunter*, the Court invalidated a referendum adopted by a majority of voters of the city of Akron, Ohio, that amended the city charter to require popular approval of any ordinance regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry. . . . " *Id.* at 387. The charter amendment thus not only repealed a fair housing ordinance previously enacted by the city council, "but also required the approval of the electors before any future [housing discrimination] ordinance could take effect." *Id.* at 389-90.

This Court, by a vote of 8-1, struck down the Akron amendment, finding that it "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390. The Court readily discounted the facial neutrality of the charter amendment, which "dr[ew] no distinctions among racial and religious groups," finding that it would nonetheless uniquely disadvantage those benefitting from race-conscious fair housing laws – i.e., minorities – by forcing them to run a legislative "gauntlet" of popular approval that other laws and thus other groups were spared. *Id.* at 390-91. As the Court concluded, "[t]he reality is that the law's impact falls on the minority." *Id.* at 391.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court reaffirmed that, while the state may make it more difficult for everyone across the board to enact or enforce laws on a particular subject matter, it may not make it selectively more difficult for racial minorities alone.

Seattle held that the Equal Protection Clause prohibits any law that "subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. Like the decision in *Hunter*, *Seattle* barred a state from selectively burdening attempts to secure programs that "inure[ ] primarily to the benefit of the minority." *Seattle*, 458 U.S. at 472; *see Hunter*, 393 U.S. at 391.

Specifically, *Seattle* invalidated Initiative 350, a state measure that provided in a seemingly neutral fashion (it made no mention of race or racial minorities whatsoever) that "no school board . . . shall directly or indirectly require any student to attend a school other than [the geographically closest school]." 458 U.S. at 462. The initiative, however, contained so many exceptions to this general prohibition that its sole practical effect was to bar race-conscious busing to redress *de facto* segregation, while permitting busing for any other reason. *Id.* at 462-63. After Initiative 350, it became pointless for advocates of race-conscious busing even to approach their local or state school boards to seek such measures. While the Court recognized that both minority and non-minority citizens might favor busing programs, it concluded nonetheless that Initiative 350 "allocat[ed] governmental power nonneutrally, by explicitly using the **racial** nature of a decision to determine the decisionmaking process," in violation of the *Hunter* principle. *Id.* at 470.[13]

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[13] Like other strands of equal protection jurisprudence, the *Hunter-Seattle* doctrine accords heightened scrutiny to laws lacking sufficient generality. By restructuring the political process so that issues of special interest to minorities – and only those issues – were moved from the local to the statewide level, the Washington initiative effectively gerrymandered the political process in a way that was unfair to minorities. *Seattle* is thus in keeping with a long line of cases equally concerned with preserving a "just framework within which the diverse political groups in our society may fairly compete." *Seattle*, 458 U.S. at 470 (quoting *Hunter*, 393 U.S. at 393); *see also id.* at 467 ("The Equal Protection Clause of the Fourteenth Amendment

Proposition 209 works precisely the same sort of change in the rules of political engagement that this Court condemned in *Seattle*. Here, as in *Seattle*, the political process before the initiative gave discretion to state agencies and local legislative and executive bodies over the matters reached by the initiative. Here, as in *Seattle*, that prior political discretion included the power to enact constitutionally permissible measures designed to correct past race discrimination and promote racial integration. And here, as in *Seattle*, the initiative leaves that discretion wholly in place, with the sole exception of race- (and here sex-) based preferences that, like the busing measures barred by the *Seattle* initiative, inure to the benefit of racial minorities (and, here, women).[14]

Thus here, as in *Seattle*, the initiative imposes a "comparative burden on minority interests," *id.* at 475, by "remov[ing] the authority to address a racial [and, here, a sex] problem – and only a racial [and, here, a sex] problem – from the

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guarantees racial minorities the right to full participation in the political life of the community.") (citing *White v. Regester*, 412 U.S. 755 (1973)); *Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.") (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

[14] In fact, the programs banned by the two initiatives literally overlap – Proposition 209 bans precisely the same programs banned by 350, and then some. As the *Seattle* Court recognized, Initiative 350 prohibited enactment of racial reassignment programs running the full gamut from non-court-ordered busing to "racially controlled enrollment at magnet schools." *Seattle*, 458 U.S. at 464-65 & n.7. Proposition 209 does exactly the same thing, barring the adoption of race-conscious enrollment procedures at magnet schools and other race-conscious school desegregation programs. *CEE*, 946 F.Supp. at 1494, 1497. Just like the initiative in *Seattle*, 209 removes from the political process authority over remedies for both *de facto* segregation and *de jure* segregation. *Seattle*, 458 U.S. at 465-66 & n.10.

existing decisionmaking body." *Id.* at 474. After Proposition 209, for example, women can no longer appeal to county boards of supervisors to rectify years of systematic sex discrimination by a sheriff's department. No matter the volume of evidence of past sex discrimination, or the intractability of that discrimination to sex-neutral remedies, the ordinary political process is closed off to women seeking sex-conscious remedies. Instead, they must either finance a statewide initiative and persuade a majority of California's voters to enact a local sex-conscious plan or, alternatively, file a class-action lawsuit and thereby place the matter before a federal judge. By contrast, Proposition 209 leaves the political process open to those seeking remedies for other kinds of discrimination and those seeking preferences of every other stripe, no matter their unfairness or their lack of relation to merit-based outcomes.

The court of appeals, however, purported to distinguish *Seattle* in three critical ways. Each of these purported distinctions either creates a significant conflict with this Court's equal protection jurisprudence or raises questions so novel and far-reaching as to warrant this Court's review.

First, the appeals court found the *Hunter-Seattle* line of cases supposedly inapplicable because Proposition 209 is facially neutral, banning classifications that work to the advantage or disadvantage of minorities and women. Despite the uncontradicted evidence showing that Proposition 209's sole change in law was to ban constitutionally permissible programs benefitting women and minorities – and that the initiative's antidiscrimination mandate was pure surplusage – the court characterized 209 as "a law that addresses in neutral fashion race-related and gender-related matters." 110 F.3d at 1444, 1446. The court of appeals then held it "paradoxical" that a law like Proposition 209, carefully crafted to be neutral on its face, could somehow amount to impermissible discrimination. 110 F.3d at 1446.[15]

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[15] The court of appeals relied in part upon *Seattle*'s companion case, *Crawford v. Board of Education*, 458 U.S. 527

This holding, however superficially attractive, would if sustained necessarily overrule both *Seattle* and *Hunter*. In those decisions, the Court stressed that the key question is not whether the prohibition was cast in facially race-neutral terms. Rather, the issue is whether "the practical effect of [the initiative] is to work a reallocation of power" that tilts the political playing field solely against racial minorities. *Seattle*, 458 U.S. at 474; *see Hunter*, 393 U.S. at 391. Thus, despite Initiative 350's complete lack of any reference to race, the *Seattle* Court had no difficulty discerning that the programs banned by the initiative "inure[d] primarily to the benefit of the minority and [were] designed for that purpose." *Id.* at 472.

(1982), in asserting that Proposition 209 "addresses in a neutral fashion, race-related and gender-related matters." 110 F.3d at 1446. *Crawford*, however, is inapposite. *Crawford* upheld Proposition I, a popularly enacted amendment of the California constitution overriding a prior judicial interpretation of that state constitution requiring racial busing to redress *de facto* segregation. Proposition I imposed no burden on the ability of any group to pursue racial busing measures through the political process. State and local governments remained free voluntarily to adopt race-conscious busing to redress *de facto* segregation. *See id.* at 536 & n.12 (noting that "[i]n this respect this case differs from the situation presented in *[Seattle]*"). Proposition I was instead a "mere repeal" of the California Supreme Court's unusually broad interpretation of the state's equal protection clause. In upholding Proposition I, this Court explained: "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539.

Proposition 209, by contrast, does more than effect a "simple repeal" of race- and sex-conscious affirmative action laws. It prospectively prohibits any unit of state and local government from ever adopting a program according "preferential treatment" based on race or sex. *See* Amar & Caminker, "Equal Protection, Unequal Political Burdens, and the CCRI," 23 *Hast. Con. L.Q.* 1019, 1049-53 (1996).

Proposition 209 similarly aims solely at programs designed to benefit minorities and women.

Proposition 209 is no more saved by its antidiscrimination clause than the *Seattle* initiative would have been if it had included a superfluous provision stating that "No school board shall segregate or discriminate on the basis of race" alongside its prohibition of desegregative busing plans. Such a provision, like the antidiscrimination provision of 209, is redundant of pre-existing law and therefore irrelevant to the constitutional analysis. The only operative clause in both instances is the one making it harder to enact race-conscious legislation in minorities' favor – the very sort of racially selective burden condemned in both *Hunter* and *Seattle*.

Second, the court of appeals held that *Hunter* and *Seattle* do not govern this case because the race and sex preferences in contracting, education and employment that are blocked by 209 – unlike the fair housing laws and busing programs that were blocked by the laws invalidated in those cases – supposedly implicate greater harms to the constitutional interests of whites (and men). As the court of appeals put it, "equal protection rights against political obstructions to **equal** treatment" do not entail "equal protection rights against political obstructions to **preferential** treatment." 110 F.3d at 1445 (emphasis added). According to the court of appeals, the race-conscious busing programs at issue in *Seattle* merely "reshuffl[ed]" students without implicating any constitutional rights on the part of white students, while Proposition 209 creates a "stacked deck" in favor of minorities and thereby "trench[es] on Fourteenth Amendment values." *Id.* at 1445 & n.16.

Whether or not the existence of constitutional interests on both sides might distinguish *Hunter*, it clearly fails to distinguish *Seattle*. The busing programs forbidden by the *Seattle* initiative, like the programs forbidden by Proposition 209, imposed distinctions based on race. Black schoolchildren were allocated places in schools outside the neighborhoods in which they lived based solely on their race, displacing white students who otherwise would have attended those schools under a race-neutral attendance policy. Like race-conscious

affirmative action measures, race-conscious busing might well violate the constitutional rights of whites unless appropriately tailored to redress past or present race discrimination or segregation. *See Missouri v. Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring) (indicating that race-conscious busing is subject to strict scrutiny). Nonetheless, *Seattle* held that minorities enjoyed an equal protection right to seek such beneficial race-conscious measures insofar as they were constitutionally permissible or required. Thus, while **some** race and sex preferences, like some busing programs, might be constitutionally forbidden, a barrier to the enactment of **any** race- (and sex-) based preferences, no matter how permissible, falls squarely within the constitutional prohibition set forth in *Seattle*.

Seeking to escape the logic of *Seattle*, the court of appeals suggests that a busing program drawing distinctions based on race should be subject to less searching scrutiny than affirmative action programs drawing distinctions based on race. But this novel concoction of a category of *de minimis* race-based measures (i.e. so-called "reshuffle" programs) finds no support in this Court's precedents. To the contrary, this Court has applied strict scrutiny to **all** race-based classifications – whether or not they exclusively burden one race more than another.[16]

In any event, the focus of *Hunter* and *Seattle* was on equal access to the political process and not on the end-product of that process. The question was simply whether the programs that could no longer be sought from local representative bodies would "inure primarily to the benefit" of racial minorities if enacted. Just like the voter-enacted initiatives in those cases, 209 nonneutrally restructures the political

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[16] *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (applying strict scrutiny to anti-miscegenation statute drawing "distinctions . . . according to race" even though it equally burdened both blacks and whites); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (holding strict scrutiny applicable to electoral redistricting that "expressly distinguish[ed] among citizens because of their race," though not diluting anyone's vote).

process to the detriment of minority interests. Before Proposition 209, as before Initiative 350, racial minorities (and here, women) could seek beneficial race-specific (and here, sex-specific) legislation or executive action in the discretion of their state or local representatives; after Proposition 209, as after Initiative 350, such measures require the far more onerous task of appealing to the statewide electorate.[17] The anti-minority tilt in the political playing field in each case is indistinguishable, whether or not one might otherwise differentiate busing from affirmative action in employment, education and contracting.

Third, the court of appeals suggested that the state's greater power to reserve to itself all decisions on public employment, education, and contracting somehow includes the lesser power **selectively** to withdraw from state agencies and local governments discretion it had previously granted to them to adopt race- and sex-conscious preferences in these areas. This holding is plainly inconsistent with *Seattle* and *Hunter*. Nothing in those decisions bars states and localities from repealing their own affirmative action measures once enacted. *See Seattle, Crawford*, 458 U.S. at 483. And nothing in those decisions prevents the state from making the enactment of policies **generally** more difficult. *See Seattle*, 458 U.S. at 469-70 (noting that "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack, though they may 'make it more difficult for minorities to achieve favorable legislation' "); *see also Hunter*, 393 U.S. at 393-94 (Harlan, J., concurring).

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[17] Proposition 209's impact on the political process is even more burdensome than that of Initiative 350. Proposition 209 is an amendment to California's Constitution, and can be modified or altered only by the California electorate. 946 F. Supp. at 1498-99. By contrast, Initiative 350 could be repealed by the state legislature after two years and could be "amended within two years by a vote of two-thirds of each house of the legislature." *Seattle* 458 U.S. at 462 n.4.

Thus, the state and its subdivisions might repeal any affirmative action program that is not itself constitutionally required. Such repeals work no change in access to the political process whatsoever. Or the state might eliminate all preferences (including those based on race and sex) wholesale, by, for example, requiring that state agencies and subdivisions award contracts to the lowest responsible bidder. The state might also undo all race- and sex-based preferences in public university admissions by specifying particular admissions criteria, such as grade point averages and performance on standardized exams, without violating the *Hunter-Seattle* principle. Such a change would alter the rules of political access, but for everyone, not just those seeking beneficial legislation on the basis of race or sex. But, as *Seattle* made clear, the greater power to make race-neutral changes in access to the political process clearly does not entail any power to take the discriminatory and hardly "lesser" shortcut of **selectively** eliminating discretion over race and sex preferences alone.

In sum, this case is materially indistinguishable from *Seattle*.[18] The decision below conflicts with both *Hunter* and

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[18] The only respect in which this case might be thought to differ from *Seattle* is one considered but ultimately not relied upon by the court of appeals: namely, that Proposition 209 makes it selectively more difficult for women as well as for racial minorities to seek beneficial legislation. But the logic of *Hunter* and *Seattle* applies as clearly to selective political burdens on women as it does to selective political burdens on racial minorities. Women, like racial minorities, are subject to "conditions of prejudice" that have historically inhibited their political power. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). For that very reason, this Court requires an "exceedingly persuasive reason" before a sex-discriminatory law may be upheld. *United States v. Virginia*, 116 S. Ct. at 2275. Whether or not the *Hunter-Seattle* principle extends beyond classifications on the basis of group membership triggering heightened scrutiny, it surely applies to those that do, including at least sex as well as race. And, in any event, the addition of gender to 209

Seattle. Indeed, under the reasoning applied by the court of appeals, *Seattle* itself would have been decided the other way.

3. This Court should resolve whether the decision below is consistent with the holding of *Romer v. Evans*.

Independently of its bar on the selective denial of access to the political process, the Equal Protection Clause bars the selective denial of opportunity to seek protection against discrimination. Just two terms ago, this Court held:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer v. Evans, 116 S. Ct. 1620, 1628 (1996). This equal protection principle is separate and independent from the *Hunter-Seattle* principle. *See id.* at 1624 (noting that the Colorado Supreme Court had relied on *Hunter-Seattle*, but affirming on a "rationale different from that adopted by the State Supreme Court"). Applying this principle, *Romer* invalidated Colorado's Amendment 2, an initiative that disabled "government and each of its parts" from remedying discrimination against gays and lesbians.

Like Amendment 2, Proposition 209 prevents particular identified groups from seeking protection from discrimination against them – here, in the form of remedial race- and sex-based preferences – from every unit of government in the state, including the state courts. Of course, racial minorities and women are not wholly foreclosed under 209 from seeking

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hardly cures its constitutional infirmity with respect to race – whether or not, as we argue, it aggravates 209's constitutional flaws.

any state antidiscrimination remedies, as gay men and lesbians were foreclosed under Amendment 2. But *Romer* did not turn on the absolute foreclosure of all remedies to gay men and lesbians, *see id.* at 1626-27 (declining to decide whether "homosexuals could find some safe harbor in [state antidiscrimination] laws of general application"), but on the **comparative** disability Colorado imposed upon them in relation to other groups. In this respect, Proposition 209 works a harm empirically similar to that worked by Amendment 2: Under 209, every unit of state and local government is closed off to minorities and women seeking constitutionally permissible race- and sex-conscious programs to remedy discrimination. All other interest groups may still seek all types of remedies for past discrimination, or preferences based on any other criteria. By making it "more difficult for one group of citizens than for all others to seek aid from the government," Proposition 209 constitutes a "denial of equal protection of the laws in the most literal sense." *Romer*, 116 S. Ct. at 1628.

4. This Court should clarify whether states may enact laws that impede Title VII's national policy of encouraging state and local governments voluntarily to remedy their own past discrimination.

This Court has consistently rejected the claim that Title VII mandates absolutely colorblind and sexblind hiring and promotion practices. To the contrary, it has recognized that Congress meant to encourage public and private employers to meet their civil rights obligations through voluntary race- and sex-conscious affirmative action programs. Such measures are vital to fulfill Title VII's goal of "break[ing] down old patterns of racial segregation and hierarchy" *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979), while allowing employers to avoid the trouble and expense of litigation.

The district court found that Proposition 209 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Title VII, by outlawing a critical means of securing voluntary compliance with this statute. 946 F. Supp. at 1511 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), 1513-17. The court of appeals nevertheless rejected

the claim that 209 was preempted by Title VII, holding the two laws "entirely consistent." 110 F.3d at 1447.[19]

In so holding, the panel ignored decisions of this Court holding that government authority to design and implement narrowly-tailored race- and sex-conscious programs play a "crucial role in furthering Title VII's purpose." *Johnson*, 480 U.S. at 630. As Justice O'Connor has stated, voluntary compliance is particularly vital to public-sector employers:

> The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.

Wygant, 476 U.S. at 290 (concurring opinion).[20] Indeed, in extending coverage of Title VII to state and local public entities, Congress expressly found that:

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[19] The court of appeals erroneously stated that "all Title VII preempts" are state laws that actually conflict with Title VII by requiring an act that would be an unlawful employment practice under Title VII. 110 F.3d at 1447 (citing *Cal. Fed. S&L Ass'n v. Guerra*, 479 U.S. 272 (1987) (plurality) and 42 U.S.C. § 2000e-7). In fact, *Guerra* explicitly recognized that § 1104 (42 U.S.C. § 2000h-4), which applies to the entirety of the Civil Rights Act, **forbids** state laws that are "inconsistent with any of the purposes of this Act". *Guerra*, 479 U.S. at 282; *see UAW v. Johnson Controls*, 499 U.S. 187, 209 (1991) (restating *Guerra's* holding that law was "not preempted by Title VII because it was not inconsistent with the purposes of the federal statute **and** did not require an act that was unlawful under Title VII") (emphasis added). For the reasons stated above, Proposition 209 is inconsistent with Title VII's purpose of encouraging voluntary compliance and preserving the crucial tool of voluntary affirmative action.

[20] *See also Weber*, 443 U.S. at 204 (Title VII intended to cause "employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.").

> Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

Id. at 290 (quoting S.Rep. 92-415, at 10 (1971)).

There is no doubt that Congress viewed voluntary action on the part of employers to be preferable to court-ordered remedies for past discrimination: "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986).[21] Proposition 209, however, dissolves all state and local power voluntarily to redress past official discrimination through race- and sex-conscious means, no matter how egregious or compelling the evidence, or how intractable the effects of that discrimination.

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[21] The Court in *Local No. 93*, 478 U.S. at 516, quoted with approval EEOC guidelines (29 C.F.R. § 1608.1(c)) which specifically endorse voluntary affirmative action as consistent with Congress' purpose:

> The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.

In some cases, "affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities. . . . ' " *Local 28, Sheet Metal Workers v. EEOC*, 428 U.S. 421, 450 (1986) (plurality opinion) (emphasis added).

At the same time, it effectuates a wholesale transfer of this authority from elected officials to the federal judiciary. It thus obliterates the " 'breathing room' for employer initiatives" contemplated by Congress. *Johnson*, 480 U.S. at 645 (Stevens, J., concurring); *see also Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (to prohibit all race- and sex-conscious programs "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."). Even when faced with claims of intractable official discrimination against women and minorities, public officials have no choice but to throw up their hands. Proposition 209 leaves them without authority to undertake affirmative remedial action on their own, and with no recourse but passively to await litigation.

Proposition 209 thus eliminates the safe passage that Congress has afforded to state and local governments "between the competing hazards of liability to minorities if affirmative action **is not** taken and liability to nonminorities if affirmative action **is** taken." *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring) (quoting *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring)). After 209, it is exclusively the province of the federal judiciary to decide when, if, and how corrective measures are to be instituted. Nothing could be more clearly contrary to Title VII's purpose of leaving employers free – and, indeed, of encouraging them – voluntarily to remedy their own past discrimination.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

A Opinion of United States Court of Appeals for the Ninth Circuit vacating preliminary injunction, 110 F.3d 1431 (April 8, 1997) A1

B Opinion of the United States District Court for the Northern District of California granting preliminary injunction, 946 F. Supp. 1480 (December 23, 1996) B1

C Order of United States Court of Appeals for the Ninth Circuit amending April 8, 1997 opinion, denying petition for rehearing, and rejecting suggestion for rehearing en banc (August 21, 1997) C1

D Order of United States Court of Appeals for the Ninth Circuit denying motion for stay of mandate (August 26, 1997) D1

E Text of constitutional and statutory provisions involved: E1

1 Fourteenth Amendment to U.S. Constitution E1

2 Excerpts from Title VII of the Civil Rights Act of 1964 and regulations promulgated thereunder E3

3 42 U.S.C. § 1983 ..... E14

4 California Constitution, art. I, sec. 31 (Proposition 209) E15

F Opinions Dissenting from the denial of rehearing en banc by Judge Schroeder (joined by Judges Pregerson, Norris, and Tashima) and by Judge Norris (joined by Judges Schroeder, Pregerson, and Tashima); an opinion by Judge Hawkins commentary on the denial of rehearing en banc. (August 28, 1997) F1

APPENDIX A

The COALITION FOR ECONOMIC EQUITY; California NAACP; Northern California NAACP; California Labor Federation; AFL-CIO; Council of Asian American Business Associations, California; Chinese American Citizens' Alliance; Women Construction Business Owners and Executives, California Chapter; United Minority Business Entrepreneurs; Chinese for Affirmative Action; Black Advocates in State Service; Asian Pacific American Labor Alliance; La Voz Chicana; Black Chamber of Commerce of California; Michele Bennett; Nancy Burns; Floyd Chavez; Christopher Clay; Dana Cunningham; Iran Celeste Davila; Shevade Dove, nfr Melodie Dove; Jessica Lopez; Virginia Mosqueda; Salvador Ochoa; Clifford Tong, Plaintiffs/Appellees,

v.

Pete WILSON, Governor; Daniel E. Lundgren, Attorney General for the State of California; Joanne Corday Kozberg, Secretary of State and Consumer Services Agency and Cabinet Member; James Gomez, Dir., Dept. of Corr., Defendants/Appellants,

Californians Against Discrimination and Preferences, Inc., Defendant-Intervenor/Appellant.

Nos. 97-15030, 97-15031.

United States Court of Appeals,

Ninth Circuit.

Argued Feb. 10, 1997.

Submission Deferred, and
Submitted March 3, 1997.

Decided April 8, 1997.

Individuals and groups claiming to represent interests of racial minorities and women filed complaint alleging that provision of the California Constitution prohibiting public race and gneder preferences denied equal protection, and was void under the supremacy clause because it conflicted with federal civil rights statutes. The United States District Court for the Northern District Court for the Northern District of California, Thelton E. Henderson, J., Chief Judge, 946 F.Supp. 1480, granted preliminary injunction enjoining the state from implementing provision, and the state appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) provision does not violate the equal protection clause in any conventional sense; (2) provision does not violate the equal protection clause on theory that imposes an unequal "political structure" that denies women and minorities a right to seek preferential treatment from the lowest level of government; (3) provision was not preempted by Title VII; and (4) with no likelihood of success on the merits of equal protection and preemption claims, plaintiffs were not entitled to preliminary injunction.

Preliminary injunction vacated; stay denied as moot; remanded.

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Tamu K. Sudduth, Morrison & Foerster, San Francisco, CA, for amici curiae A. Ruiz Construction Company and Associates, Inc., Chiang C.M. Construction, Inc., and Cresci Electric, Inc.

Jack D. Forbes, University of California, Davis, for amicus curiae Jack D. Forbes.

Sharon L. Browne, Pacific Legal Foundation, Sacramento, CA, for amici curiae Richard Hanlin, et al.

Theodore B. Olsen, Gibson, Dunn & Crutcher, Washington, DC, for amicus curiae Independent Women's Forum.

Clint Bolick, Institute for Justice, Washington, DC, for amici curiae Institute for Justice et al.

G. Michael German, Law Offices of G. Michael German, San Francisco, CA, for amicus curiae Log Cabin Republicans of California.

Frank Wu, Howard University School of Law, Washington, DC, for amici curiae National Asian Pacific American Legal Consortium et al.

Kevin T. Snider, United States Justice Foundation, Escondido, CA, for amici curiae United States Justice Foundation et al.

Appeal from the United States District Court for the Northern District of California, Thelton E. Henderson, District Judge, Presiding. D.C. No. CV-96-4024-TEH.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether a provision of the California Constitution prohibiting public race and gender preferences violates the Equal Protection Clause of the United States Constitution.

I

A

On November 5, 1996, the people of the State of California adopted the California Civil Rights Initiative as an amendment to their Constitution. The initiative, which appeared on the ballot as Proposition 209, provides in relevant part that

> [t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. 1, § 31(a).[1]

The California Legislative Analyst's Office portrayed Proposition 209 to the voters as a measure that would eliminate public race-based and gender-based affirmative action programs. The California Ballot Pamphlet explained to voters that:

> A YES vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A NO vote on this measure means State and local government affirmative action programs

---

[1] When we use the word "race," we refer also to color, ethnicity, and national origin.

would remain in effect to the extent they are permitted under the United States Constitution.

The Ballot Pamphlet also included arguments by proponents and opponents of Proposition 209. Proponents urged a "yes" vote, arguing that:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.
>
> . . . .
>
> And two wrongs don't make a right! Today, students are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE.
>
> That's just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination!
>
> And, remember, Proposition 209 keeps in place all federal and state protections against discrimination!

Opponents of Proposition 209 urged a "no" vote, responding that:

> California law currently allows tutoring, mentoring, outreach, recruitment, and counseling to help ensure equal opportunity for women and minorities. Proposition 209 will eliminate affirmative action programs like these that help

> achieve equal opportunity for women and minorities in public employment, education and contracting. Instead of reforming affirmative action to make it fair for everyone, Proposition 209 makes the current problem worse.
>
> . . . .

The initiative's language is so broad and misleading that it eliminates equal opportunity programs including:

> – tutoring and mentoring for minority and women students;
>
> – affirmative action that encourages the hiring and promotion of qualified women and minorities;
>
> – outreach and recruitment programs to encourage applicants for government jobs and contracts; and
>
> – programs designed to encourage girls to study and pursue careers in math and science.

Proposition 209 passed by a margin of 54 to 46 percent; of nearly 9 million Californians casting ballots, 4,736,180 voted in favor of the initiative and 3,986,196 voted against it.

B

On the day after the election, November 6, 1996, several individuals and groups ("plaintiffs") claiming to represent the interests of racial minorities and women filed a complaint in the Northern District of California against several officials and political subdivisions of the

State of California ("the State").[2] The complaint, brought under 42 U.S.C. § 1983, alleges that Proposition 209, first, denies racial minorities and women the equal protection of the laws guaranteed by the Fourteenth Amendment, and, second, is void under the Supremacy Clause because it conflicts with Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Educational Amendments of 1972. As relief, plaintiffs seek a declaration that Proposition 209 is unconstitutional and a permanent injunction enjoining the State from implementing and enforcing it.

With their complaint, plaintiffs filed an application for a temporary restraining order ("TRO") and a preliminary injunction. The district court entered a TRO on November 27, 1996, and granted a preliminary injunction on December 23, 1996.[3] The preliminary injunction enjoins the State, pending trial or final judgment, "from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education or public contracting." *Coalition for Econ. Equity v. Wilson*, 946 F.Supp. 1480, 1520-21 (N.D.Cal.1996).

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[2] When we refer to "the State," we mean, more specifically, Defendants/Appellants. Certain defendants did not appeal the preliminary injunction, including the City and County of San Francisco, the County of Marin, and Delaine Eastin, all of whom have filed briefs and papers in support of Plaintiffs/Appellees.

[3] The district court also granted plaintiffs' motion provisionally to certify the plaintiff class on November 27, 1996, and their motion to certify the defendant class on December 16, 1996.

The district court provided extensive findings of fact and conclusions of law in support of the injunction. This lawsuit, the court explained, challenges Proposition 209's prohibition against race and gender preferences, not its prohibition against discrimination. Plaintiffs' constitutional challenge is "only to that slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race- and gender-conscious affirmative action programs." *Id.* at 1489.

The elimination of such programs, the district court found, would reduce opportunities in public contracting and employment for women and minorities. It further would cause enrollment of African-American, Latino, and American Indian students in public colleges to fall, though enrollment of Asian-American students would increase. Finally, the court found that minorities and women, to reinstate race-based or gender-based preferential treatment, would have to re-amend the California Constitution by initiative.

From these findings of fact the district court concluded, first, that plaintiffs have demonstrated a likelihood of success on their equal protection claim. Proposition 209, the court reasoned, has a racial and gender focus which imposes a substantial political burden on the interests of women and minorities. The court held that *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), prohibit such treatment of racial and gender issues in the political process.

The district court concluded, second, that plaintiffs have also demonstrated a likelihood of success on their pre-emption claims. Title VII, the court reasoned, preserves the discretion of public employers voluntarily to use race and gender preferences. To the extent that Proposition 209 bans such preferences statewide, the court held that Title VII pre-empts it under the Supremacy Clause.

The district court next explained that plaintiffs would suffer irreparable harm if Proposition 209 takes effect. If not enjoined, Proposition 209 immediately would ban existing preference programs in violation of plaintiffs' constitutional rights. The State, in contrast, the court concluded, would suffer little hardship from a preliminary injunction, which merely would suspend implementation of Proposition 209 pending trial.

Finally, the district court believed that a preliminary injunction would serve the public interest. Preserving the pre-election status quo would "harmonize" the public need for "clear guidance with respect to Proposition 209" with "the compelling interest in remedying discrimination that underlies existing constitutionally-permissible state-sponsored affirmative action programs threatened by Proposition 209."[4] *Coalition*, 946 F.Supp. at 1520.

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[4] The district court deemed it "appropriate to waive the bond requirement" of Federal Rule of Civil Procedure 65(c) in this case. *Coalition*, 946 F.Supp. at 1521 n. 54. We need not address whether the district court erred by failing to require plaintiffs to post a bond in light of our conclusion on the merits. We note, however, that Rule 65(c) provides that "[n]o . . . preliminary injunction shall issue except upon the

C

On December 31, 1996, Californians Against Discrimination and Preferences ("CADP"), the defendant/intervenor, applied to the district court for a stay of the preliminary injunction pending appeal. The State joined in the application. CADP and the State also filed notices of appeal to this court on January 3, 1997, and subsequently moved to stay the district court's injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8. The district court entered its order declining to stay the injunction on February 7, 1997. On February 10, 1997, we heard oral argument on the application to us for a stay. The parties' arguments for and against a stay pending appeal focused primarily on the merits underlying the preliminary injunction itself. We thus deferred submission of the stay application and expedited submission on the merits,[5] which we now decide.

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giving of security by the applicant . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65; *see generally New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 363, 54 L.Ed.2d 439 (1977) (Opinion of Rehnquist, Circuit Justice, granting stay of injunction) (noting "that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

[5] The practice of this Circuit, made explicit in *Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir.1995), is that the panel to which a motion to stay or to expedite an appeal from a preliminary injunction is referred may retain jurisdiction over the merits of the appeal itself. The panel that decided *Gregorio T.* had been referred motions to stay, to consolidate, and to expedite appeals from a preliminary injunction against the implementation and enforcement of California voter initiative Proposition 187. The

II

Before reaching the merits of the preliminary injunction, we pause to consider whether this case even belongs in federal court. No California state court has yet construed the meaning or effect of Proposition 209. Rather, plaintiffs ask a federal tribunal to enjoin flat-out this state constitutional amendment passed by a majority of the voters.[6] The district court remarked that the issue in this

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Gregorio T. panel, citing the priority and expedited decision that we must give appeals from preliminary injunctions under 28 U.S.C. § 1957 and Ninth Circuit Rule 3-3 (effective July 1, 1995), retained jurisdiction over the merits of the appeals. *Id.* at 600; *see Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir.1995). Pursuant to *Gregorio T.*, we likewise retained jurisdiction over the merits of these appeals, which, similarly, challenge a preliminary injunction against the implementation and enforcement of a California voter initiative.

[6] The district court concluded that plaintiffs have standing to bring this suit, which the State does not challenge on appeal. The court found (1) that Proposition 209 would injure plaintiffs by eliminating programs that benefit them; (2) that the injury would result from the State's enforcement of Proposition 209; and (3) that a declaration that Proposition 209 is unconstitutional and an injunction against its enforcement would redress the plaintiffs' alleged injuries. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs, conversely, argue that we must dismiss this appeal because under *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), CADP had no standing to pursue a stay or an appeal. The Supreme Court expressed "grave doubts" in *Arizonans* whether the proponents of Arizona's "English only" initiative had "standing under Article III to pursue appellate review." *Id.* at ___, 117 S.Ct. at 1068. The issue, however, was one that the Court need not "definitively resolve" because the plaintiff herself lacked

case is not "whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights." *Coalition*, 946 F.Supp. at 1490.

No doubt the district court is correct, at least in theory. Judges apply the law; they do not sua sponte thwart wills. If Proposition 209 affronts the federal Constitution – the Constitution which the people of the United States themselves ordained and established – the district judge merely reminds the people that they must govern themselves in accordance with principles of their own choosing. If, however, the district judge relies on an erroneous legal premise, the decision operates to thwart the will of the people in the most literal sense: What the people of California willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established. A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.

The Supreme Court recently reminded federal judges that we should not even undertake to review the constitutionality of a state law without first asking: "Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, ___ U.S. ___, ___, 117 S.Ct. 1055, 1072, 137 L.Ed.2d 170 (1997). As a general rule, federal courts "ought not to consider the Constitutionality of a state

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standing. We likewise need not definitively resolve this issue. Regardless of whether CADP has standing to appeal or seek a stay, there is no question that the State had standing to pursue both.

statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 526, 81 S.Ct. 1752, 1768, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting)). Justice Ginsburg emphasized for a unanimous court that "[w]hen anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Id.* "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at ___, 117 S.Ct. at 1074.

The ink on Proposition 209 was barely dry when plaintiffs filed this lawsuit. For this federal tribunal to tell the people of California that their one-day-old, never-applied-law violates the Constitution, we must have more than a vague inkling of what the law actually does. Plaintiffs challenge Proposition 209 to the extent that it eliminates "affirmative action." A California court that considered Proposition 209's pre-enactment ballot title and ballot label remarked that the term "affirmative action" is an "amorphous, value-laden term," "rarely defined so as to form a common base for intelligent discourse." *Lungren v. Superior Court*, 48 Cal.App.4th 435, 55 Cal.Rptr.2d 690, 694 (1996) (internal ellipses and citation omitted). "Most definitions of the term would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs." *Id.*

The district court properly limited its use of the term "affirmative action" to state programs that use race or gender classifications.[7] It enjoined Proposition 209 only to the extent that it eliminates programs that grant preferential treatment to individuals on the basis of their race or gender. The court cited as examples programs that would prefer contractors of a certain race or gender in the evaluation of bids for public contracts, programs that would prefer prospective employees of a certain race or gender for public employment, and programs that would prefer prospective students of a certain race or gender for public education or financial aid. Unlike in *Arizonans*, the State does not dispute that Proposition 209 operates to eliminate such programs.[8] Quite the contrary, the district court found that Defendant/Appellant Pete Wilson, Governor

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[7] Plaintiffs apparently do not feel the same constraints. They argue, for example, that we must affirm the injunction because "[t]he remedy for intentional discrimination often calls for race-specific relief." *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir.1991). But "race-specific relief" is hardly synonymous with "preferential treatment on the basis of race." A state may "eradicate racial discrimination" in many ways that do not involve racial preferences. When, for example, a state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference "on the basis of their race" but on the basis that they have been individually wronged.

[8] The district court denied the State's motion to abstain pursuant to *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), after the preliminary injunction issued because, among other things, the State did not dispute that Proposition 209 prohibits some race and gender preference programs.

of California, issued an Executive Order on November 6, 1996, implementing Proposition 209 to do just that.

Without this factual basis, we would not hesitate to remand to the district court for reconsideration of the State's abstention motion in light of *Arizonans*. From the district court's findings, however, we are satisfied, to answer the Supreme Court's question, that "yes – this conflict really is necessary." We may now address the merits.

III

A preliminary injunction may issue "if the movant has shown either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor." *Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir.1996) (citation omitted). We review an order granting a preliminary injunction for an abuse of discretion. *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980).

An abuse of discretion occurs if the district court "bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1062 (9th Cir.1995) (citation omitted). We review the legal issues underlying a decision to grant an injunction de novo, as well as the conclusion that plaintiffs are likely to succeed on the merits of those issues.[9] *International Molders' and*

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[9] Plaintiffs contend, as an initial matter, that we have no authority to review the "underlying merits" of the preliminary injunction that the district court entered. Plaintiffs are correct to the extent that we will not reverse a preliminary injunction just

Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 551 (9th Cir.1986).

In granting the preliminary injunction, the district court first concluded that plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Equal Protection Clause of the Fourteenth Amendment. We must examine whether the district court's conclusion is based on an erroneous legal premise as a matter of "conventional" equal protection analysis, which looks to the substance of the law at issue, or as a

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because we would have arrived at a different result if we had applied the law to the facts of the case. *Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir.1982); *see also Associated Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1419 (9th Cir.1991) (O'Scannlain, J. concurring) (pointing out that detailed discussion of statistical evidence to determine constitutionality is inappropriate to determine constitutionality on appellate review of preliminary injunction), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992). Where, as here, however, the issue is whether the district court "misapprehended the law with respect to the underlying issues in litigation," *Sports Form*, 686 F.2d at 752 (citations omitted), we assuredly may assess whether the district court got the law right. *See Glick v. McKay*, 937 F.2d 434, 436 (9th Cir.1991) (explaining that where facts established or of no controlling relevance, constitutional issue subject to "plenary" review); *Nelson*, 799 F.2d at 550 n. 1 (explaining that abuse of discretion will be found if district court "applied incorrect substantive law") (citation omitted).

The parties to this appeal dispute whether the district court relied on an erroneous legal standard, not whether the district court wrongly applied the right legal standard to the facts of the case. Where the issue is whether the district court got the law right in the first place, we do not defer review and thereby allow lawsuits to proceed on potentially erroneous legal premises.

matter of "political structure" equal protection analysis, which looks to the level of government at which the law was enacted. We shall apply each mode of analysis to Proposition 209 in turn.

IV

As a matter of "conventional" equal protection analysis, there is simply no doubt that Proposition 209 is constitutional. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The central purpose of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). The Fourteenth Amendment forbids such conduct on the principle that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). Racial distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993) (citations omitted).

The ultimate goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984) (citation and footnote omitted). Therefore, "whenever the government treats any person unequally because of his or her

race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors v. Pena*, ___ U.S. ___, ___, 115 S.Ct. 2097, 2114, 132 L.Ed.2d 158 (1995). The Equal Protection Clause also protects against classifications based on gender. "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, ___ U.S. ___, ___, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996) (internal footnote and citation omitted).

The standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989) (plurality opinion). When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender. "Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114. Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not

suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

The Equal Protection Clause guarantees that the government will not classify individuals on the basis of impermissible criteria. Most laws, of course – perhaps all – classify individuals one way or another. Individuals receive, or correspondingly are denied, governmental benefits on the basis of income, disability, veteran status, age, occupation and countless other grounds. Legislative classifications as a general rule are presumptively valid under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). A legislative classification will deny equal protection only if it is not "rationally related to a legitimate state interest." *Id.* (citations omitted).

The general rule does not apply, however, when a law classifies individuals by race or gender. Any governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny. *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114. To be constitutional, a racial classification, regardless of its purported motivation, must be narrowly tailored to serve a compelling governmental interest, an extraordinary justification. *See, e.g., Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277-78, 106 S.Ct. 1842, 1848-49, 90 L.Ed.2d 260 (1986) (plurality opinion). When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring an "exceedingly persuasive"

justification.[10] *Cleburne*, 473 U.S. at 441, 105 S.Ct. at 3255; *see Virginia*, ___ U.S. at ___, 116 S.Ct. at 2275.

The first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws. Proposition 209 provides that the State of California shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race or gender. Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.

V

As a matter of "political structure" analysis, however, plaintiffs challenge the level of government at which the State of California has prohibited race and gender preferences. Plaintiffs contend, along with the United States as amicus curiae, that Proposition 209 imposes an unequal "political structure" that denies women and minorities a right to seek preferential treatment from the lowest level of government. The district court agreed, relying on the so-called *"Hunter"* doctrine.

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[10] Proposition 209 contains a savings clause providing that "[n]othing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting." Cal. Const. art. 1, § 31(c).

A

In *Hunter v. Erickson*, the Supreme Court addressed the constitutionality of an amendment to the Charter of the City of Akron, Ohio. Before the charter amendment was enacted, the Akron City Council had authority to pass ordinances regulating the real estate market. *Hunter*, 393 U.S. at 390, 89 S.Ct. at 560. Most ordinances became effective thirty days after the Council passed them. *Id.* The charter amendment operated to prevent the city council from enacting ordinances addressing racial discrimination in housing without majority approval of the Akron voters. *Id.* at 387, 89 S.Ct. at 558-59. The plaintiff, Nellie Hunter, who wanted a fair housing ordinance enforced, claimed that the amendment violated her right to equal protection of the laws.

The Supreme Court found in the charter amendment "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389, 89 S.Ct. at 560. The law disadvantaged those who would benefit from laws barring racial discrimination in the real estate market as against those who would benefit from other regulations of the real estate market. *Id.* at 390-91, 89 S.Ct. at 560-61. Absent a compelling state interest, the state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id* at 393, 89 S.Ct. at 561.

The Court later applied these principles to Washington State's educational decisionmaking structure in *Washington v. Seattle School District No. 1.* A statewide initiative

in Washington barred school boards from assigning students beyond their neighborhood schools. The initiative contained several broad exceptions, which effectively operated to preclude only desegregative busing. *Seattle*, 458 U.S. at 462-63, 102 S.Ct. at 3190-91. Certain school districts challenged the initiative under the Equal Protection Clause. *Id.* at 464, 102 S.Ct. at 3191-92.

As in *Hunter*, the Court determined that the initiative effected a racial classification by removing "the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474, 102 S.Ct. at 3197. The initiative had restructured the State's educational decisionmaking process to differentiate "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.* at 480, 102 S.Ct. at 3200 (internal quotation marks and citation omitted). That differentiation burdened minority interests "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483, 102 S.Ct. at 3202. Absent a compelling state interest, the initiative's unequal reordering of authority of school boards violated the Equal Protection Clause. *Id.* at 485-86, 102 S.Ct. at 3202-03.

The district court applied *Hunter* and *Seattle* to invalidate Proposition 209. Proposition 209, the court found, effected a race and gender classification by singling out race and gender preferences for unique political burdens. The court concluded that race and gender preferences, like antidiscrimination laws and integrative busing, are of special interest to minorities and women. Before Proposition 209 was enacted, the court reasoned, women and

minorities could petition local government for preferential treatment. To obtain preferential treatment now, the court concluded, women and minorities must appeal to the statewide electorate, a "new and remote level of government."

The district court next analyzed whether the classifications it gleaned from Proposition 209 withstood "heightened scrutiny." The court concluded that the classifications served no important government interest, let alone a compelling one, thus denying women and minorities equal protection of the laws.

B

The State contends that the district court's conclusion rests on an erroneous legal premise because Proposition 209, unlike the *Hunter* and *Seattle* initiatives, does not reallocate political authority in a discriminatory manner. CADP contends, additionally, that a majority of the electorate cannot restructure the political process to discriminate against itself. We address the second contention first.

1

Can a statewide ballot initiative deny equal protection to members of a group that constitutes a majority of the electorate that enacted it? Plaintiffs allege that Proposition 209 places procedural burdens in the path of women and minorities, who together constitute a majority of the California electorate. Is it possible for a majority of voters impermissibly to stack the political deck against

itself? The Supreme Court leaves us, quite frankly, a little perplexed as to the answer.

The "political structure" equal protection cases, namely *Hunter* and *Seattle*, addressed the constitutionality of political obstructions that majorities had placed in the way of minorities to achieving protection against unequal treatment. *Hunter*, holding that the Akron amendment denied minorities equal protection of the laws, observed that "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560. *Seattle* addressed a political structure held "to place special burdens on the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193. In *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the most recent "political structure" case, Colorado's Amendment 2 left homosexuals to "obtain specific protection against discrimination only by enlisting the citizenry of Colorado." *Id.* at ___, 116 S.Ct. at 1627. It would seem to make little sense to apply "political structure" equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate.

The difficulty, however, lies in reconciling what seems to be that eminently sensible conclusion with the principle that the Fourteenth Amendment guarantees equal protection to individuals and not to groups. That the Fourteenth Amendment affords individuals, not groups, the right to demand equal protection is a fundamental first principle of "conventional" equal protection jurisprudence. *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2111. The Equal Protection Clause, after all, prohibits a state

from denying "to any *person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added).

Where a state denies someone a job, an education, or a seat on the bus because of her race or gender, the injury to that individual is clear. The person who wants to work, study, or ride but cannot because she is black or a woman is denied equal protection. Where, as here, a state prohibits race or gender preferences at any level of government, the injury to any specific individual is utterly inscrutable. No one contends that individuals have a constitutional right to preferential treatment solely on the basis of their race or gender. Quite the contrary. What, then, is the personal injury that members of a group suffer when they cannot seek preferential treatment on the basis of their race or gender from local government? This question admits of no easy answer.

Hunter and *Seattle* suggest that the political structures they held unconstitutional imposed individual injuries analogous to "denying [members of a racial minority] the vote, on an equal basis with others."[11] *Seattle*, 458 U.S. at 470, 102 S.Ct. at 3195 (quoting *Hunter*, 393 U.S. at 391, 89 S.Ct. at 561). When the electorate votes up or down on a referendum alleged to burden a majority of the voters, it is hard to conceive how members of the majority have been denied the vote. If members of a majority somehow

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[11] In the voting rights cases *Hunter* cited, *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and *Avery v. Midland Co.*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), each individual was denied his or her right to a vote of substantially equal weight to the vote of other residents.

can deny their own right to ask local government for racial preferences, conceivably a statewide referendum *affording* preferential treatment to racial minorities would deny members of the racial majority the right to ask local governments to abolish racial preferences. "Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114.

Thankfully, the absence of any specific findings by the district court in this regard relieves us from having to reconcile "the long line of cases understanding equal protection as a personal right," *Id.*, with *Hunter*'s admonition that "the majority needs no protection against discrimination," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560.[12] Our task in this case is merely to determine whether the district court relied on an erroneous legal premise. We accept without questioning the district court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise

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[12] This admonition seems to perceive the right to equal protection as a group right rather than an individual right, which the Supreme Court later denounced in *Croson* and *Adarand*. When we attribute equal protection rights to groups rather than to individuals, "[i]t reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Shaw*, 509 U.S. at 647, 113 S.Ct. at 2827.

would seek to obtain race-based and gender-based preferential treatment from local entities.[13] The legal question for us to decide is whether a burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws.

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[13] CADP's argument that *Hunter* and *Seattle* do not extend to gender-based laws because women themselves constitute a majority of the electorate is, nonetheless, compelling. Had the parties presented evidence, and had the district court found, that women constitute a majority of the California electorate, we likely would conclude as a matter of law, for that reason alone, that Proposition 209's ban on gender-based preferences does not deny women equal protection. By so concluding, to be sure, we would bring to a head the tension between the protection that the "political structure" cases afford to the "ability of minority groups to achieve beneficial legislation," *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193, and the "fundamental principle of equal protection as a personal right." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2117. On the one hand, "[t]he majority needs no protection against discrimination," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560, but, on the other, the Equal Protection Clause protects the individual members of the majority, not the majority as a group. Caught in the cross-fire of seemingly irreconcilable Supreme Court precedent, we would deem it better to err on the side of common sense. To hold that women as a majority could impose a political structure that denied themselves equal protection of the laws would subject to "political structure" scrutiny any state law that imposed benefits on those that shared a minority trait (e.g. veterans), with corresponding burdens on those that shared a majority trait (e.g. the non-veterans). Such a revolutionary concept is inimical to a constitutional scheme founded on democratic self-government.

The Supreme Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 538, 102 S.Ct. 3211, 3218, 73 L.Ed.2d 948 (1982). The former denies persons against whom the law discriminates equal protection of the laws; the latter does not. Into which category Proposition 209 falls we must now determine.

In *Crawford*, the Supreme Court considered an amendment to the California Constitution that prohibited state courts from mandating pupil assignment or transportation except to remedy a specific equal protection violation. *Id.* at 532, 102 S.Ct. at 3215. Minority students had alleged that the amendment employed a racial classification that burdened minorities who sought to vindicate state-created rights. *Id.* at 536, 102 S.Ct. at 3217. The Supreme Court disagreed, holding that the amendment did not employ a racial classification. Unlike the charter amendment in *Hunter*, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539, 102 S.Ct. at 3218.

Crawford, thus, on the one hand, dictates that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Id.* at 538, 102 S.Ct. at 3218. *Hunter* and *Seattle*, on the

other hand, prohibited states from placing decisionmaking authority over certain racial issues at higher levels of government.

Plaintiffs attempt to align Proposition 209 with *Hunter* and *Seattle* and distinguish it from *Crawford*. *Crawford*, they argue, addressed an amendment that merely repealed a benefit that the state itself had afforded, not the authority of local subdivisions to afford the same benefit. *Hunter* and *Seattle*, in their view, foreclose the authority of states to withdraw local jurisdiction to enact race and gender preferences unless the state also withdraws local jurisdiction to enact preferences based on any other criteria. Such an extraordinary proposition hardly follows from *Hunter* and *Seattle*.

a

The *Hunter* doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." *Seattle*, 458 U.S. at 485, 102 S.Ct. at 3203. Rather, for the doctrine to apply at all, the state somehow must reallocate political authority in a discriminatory manner.

States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978).[14] That a law resolves an issue at a higher level

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[14] *See Williams v. Mayor*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933) ("A municipal corporation, created by a state

of state government says nothing in and of itself. Every statewide policy has the "procedural" effect of denying someone an inconsistent outcome at the local level. "[A] lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group." *James v. Valtierra*, 402 U.S. 137, 142, 91 S.Ct. 1331, 1334, 28 L.Ed.2d 678 (1971).

Hunter and *Seattle* relied expressly on the states' existing educational and housing decisionmaking processes to find that they had reallocated authority in a racially discriminatory manner. In *Hunter*, the state obstructed equal housing by removing only racially fair housing prerogatives from the lawmaking procedure for all other housing matters. In *Seattle*, the state obstructed equal education by removing only racially desegregative prerogatives from the lawmaking procedure for all other educational matters.

As the *Seattle* Court explained:

> Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs

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for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151 (1907) ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

> – including programs involving student assignment and desegregation – was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.

Seattle, 458 U.S. at 479-80, 102 S.Ct. at 3200 (internal quotation marks and citations omitted). Plaintiffs would have us extrapolate from *Seattle* that a state may never treat race *qua* race differently from any other legal classification. *Seattle* itself, however, declined that invitation.

The *Seattle* majority specifically allayed any concern that its holding rendered the state powerless to address racial issues where localities acted first. Justice Powell had lamented in dissent what a "strange notion" it was, "alien to our system – that local governmental bodies can forever preempt the ability of a State – the sovereign power – to address a matter of compelling concern to the State." *Id.* at 495, 102 S.Ct. at 3208 (Powell, J., dissenting). He questioned how a statewide repeal of busing created a racial classification when identical action by the local government would not. *Id.* at 494, 102 S.Ct. at 3207-08 (Powell, J., dissenting). To him, the decision left "unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done 'more' than the Fourteenth Amendment requires."

Id. at 498 n. 14, 102 S.Ct. at 3210 n. 14 (Powell, J., dissenting).

The majority responded that the "horribles paraded by the dissent" in footnote 14 were "entirely unrelated to this case." *Id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23. The *Seattle* majority did not question "that the State might have vested all decisionmaking authority in itself." *Id.* at 477, 102 S.Ct. at 3198; *see id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23. The State's prerogative in that regard was "irrelevant" in *Seattle*, though, because "the political structure it in fact erected impose[d] comparative burdens on minority interests. . . . " *Id.* at 477, 102 S.Ct. at 3198. The State, of course, "could have reserved to state officials the right to make all decisions in the areas of education and student assignment." *Id.* at 487, 102 S.Ct. at 3204. Conversely, the State had "not attempted to reserve to itself exclusive power to deal with racial issues generally."[15] *Id.* at 479 n. 22, 102 S.Ct. at 3200 n. 22. By removing desegregative prerogatives from these general grants of power, the State, as in *Hunter*, differentiated the treatment of racial problems in education from that afforded educational and racial issues generally.

When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific

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[15] Rather, the State had given its municipalities "the power to enact antidiscrimination ordinances." *Seattle*, 458 U.S. at 479 n. 22, 102 S.Ct. at 3199 n. 22.

area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.

b

Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment.

A denial of equal protection entails, at a minimum, a classification that treats individuals unequally. *See, e.g., Adarand,* ___ U.S. at ___, 115 S.Ct. at 2111. The "political structure" cases do not create some paradoxical exception to this *sine qua non* of any equal protection violation. In *Hunter,* the lawmaking procedure made it more difficult for Nellie Hunter to obtain protection against unequal treatment in the housing market. In *Seattle,* the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education.[16] In *Romer,* Colorado's Amendment 2 denied

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[16] The district court perceived no relevant difference between the busing programs at issue in *Seattle* and the racial preference programs at issue here. We have recognized, however, that " 'stacked deck' programs [such as race-based 'affirmative action'] trench on Fourteenth Amendment values in ways that 'reshuffle' programs [such as school desegregation] do not." *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.,* 616 F.2d 1381, 1387 (9th Cir.), *cert. denied,* 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980). Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of

homosexuals the ability to obtain "protection against discrimination," thus classifying homosexuals "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, ___ U.S. at ___, 116 S.Ct. at 1629.

Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection.[17] It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the

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certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights. *Id.*

[17] We must be sure not to misread the district court's finding that those seeking race or gender preferences now must mount a statewide campaign while "those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status, continue to enjoy access to the political process at all levels of government." Proposition 209 only prohibits preferential treatment based on race or gender. "Those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status," who "continue to enjoy access to the political process at all levels of government," include, we must remember, everyone – members of all races and both genders. If the state ever prohibited women and minorities from seeking preferences on a basis available to everyone else, such as age, disability, or veteran status, the state would violate Proposition 209's prohibition against race or gender discrimination.

Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

The alleged "equal protection" burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes. The Equal Protection Clause, parked at our most "distant and remote" level of government, singles out racial preferences for severe political burdens – it prohibits them in all but the most compelling circumstances. It is well-settled that "all governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subject to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand*, ___ U.S. at ___-___, 115 S.Ct. at 2112-13 (internal quotation marks and citation omitted). That is because "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at ___, 115 S.Ct. at 2112 (quoting *Croson*, 488 U.S. at 493, 109 S.Ct. at 721, 102 L.Ed.2d 854 (1989) (plurality)). Rather, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at ___, 115 S.Ct. at 2111. A governmental action that classifies persons on the basis of gender demands an "exceedingly persuasive justification" to survive constitutional scrutiny. *Virginia*, ___ U.S. at ___, 116 S.Ct. at 2275.

That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification. Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications – race and gender – must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification – such as wealth, age or disability – are at the mercy of statewide referenda.

After all, the "goal" of the Fourteenth Amendment, "to which the Nation continues to aspire," is "a political system in which race no longer matters." *Shaw,* 509 U.S. at 657, 113 S.Ct. at 2832. When the people enact a law that says race somehow matters, they must come forward with a compelling state interest to back it up. Plaintiffs would have us also require the people to come forward with a compelling state interest to justify a state law that says that race cannot matter in public contracting, employment, and education. Plaintiffs' counsel went even one step further at oral argument. He urged that "[t]he people of the State of California are not entitled to make a judgment as to whether compelling state interests have been vindicated. That is for the courts." *Au contraire!* That most certainly *is* for the people of California to decide, *not* the courts. Our authority in this area is limited to deciding whether the interests proffered by the people are sufficient to justify a law that classifies among individuals. If the federal courts were to decide what the interests of the people are in the first place, judicial

power would trump self-government as the general rule of our constitutional democracy.

The Constitution permits the people to grant a narrowly tailored racial preference only if they come forward with a compelling interest to back it up. *See, e.g., Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114. "[I]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires." *Shaw*, 509 U.S. at 654, 113 S.Ct. at 2830. To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

A state law that prohibits classifications based on race or gender is a law that addresses in neutral-fashion race-related and gender-related matters. As in *Crawford*, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it."[18] *Crawford*, 458 U.S. at 535, 102 S.Ct. at 3217. For these reasons, we are persuaded that the district court relied on

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[18] To the extent that Proposition 209 prohibits race and gender preferences to a greater degree than the Equal Protection Clause, it provides greater protection to members of the gender and races otherwise burdened by the preference. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980) (noting a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

an erroneous legal premise when it concluded that plaintiffs have demonstrated a likelihood of success on their equal protection claim.

VI

The district court also concluded that plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 is invalid under the Supremacy Clause because Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*, pre-empts it.[19] The district court found Title VII to be "silent" on "the role of voluntary race- and gender-conscious affirmative action" under its schema. It thus turned, pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to an interpretation of the statute by the Equal Employment Opportunity Commission ("EEOC"). An EEOC Guideline states: "Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." 29 C.F.R. § 1608.1(c). Applying *Chevron*, the court gave "substantial deference" to this interpretation of the statute.

The district court is correct that federal law may pre-empt state law to the extent that the state law "stands as an obstacle to the accomplishment and execution of the

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[19] The district court also found that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, did not pre-empt it. Plaintiffs do not contend otherwise on appeal.

full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).[20] The district court apparently overlooked, however, the express pre-emption provisions of the 1964 Civil Rights Act.[21] "In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (plurality opinion).

Section 708 of Title VII provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present of [sic] future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7. That is all Title VII pre-empts. Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment

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[20] Plaintiffs raise no claim of field pre-emption, which, as the district court noted, does not apply. The district court also rejected plaintiffs pre-emption claim on the ground that "compliance with both federal and state regulation is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

[21] In light of the express pre-emption provisions and plain language of Title VII, we do not reach the question of whether EEOC guidelines, as opposed to regulations, merit *Chevron* deference.

practice under Title VII. Quite the contrary, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Title VII, therefore, does not pre-empt Proposition 209.

Section 1104 of Title XI also generally limits the pre-emptive effect of all titles of the Civil Rights Act:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4.

Section 1104's more general pre-emption provisions would operate to pre-empt Proposition 209 only if Proposition 209 were inconsistent with any purpose or provision of the 1964 Civil Rights Act. Title VII's one command regarding race and gender preferences conclusively demonstrates that Proposition 209 is entirely consistent: "Nothing contained in this subchapter shall be interpreted to require any [entity] . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group. . . . " 42 U.S.C. § 2000e-2(j); *see Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981) ("Title VII . . . does not demand that an

employer give preferential treatment to minorities or women."). Nothing in Title VII suggests that Congress intended to leave government with less latitude under Title VII than private employers. *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 520 n. 10, 106 S.Ct. 3063, 3074 n. 10, 92 L.Ed.2d 405 (1986).

Because Title VII by its plain language does not pre-empt Proposition 209, the district court relied on an erroneous legal premise in concluding that plaintiffs are likely to succeed on the merits of their pre-emption claims.

VII

With no likelihood of success on the merits of their equal protection or pre-emption claims, plaintiffs are not entitled to a preliminary injunction. The district court determined that plaintiffs had demonstrated irreparable harm because Proposition 209 threatened to inflict an immediate and ongoing constitutional injury upon them. That conclusion, for reasons we have explained, rests on an erroneous legal premise. As we explained in *Glick v. McKay*, 937 F.2d 434 (9th Cir.1991), our review of a constitutional issue is plenary where "the facts are established or of no controlling relevance." *Id.* at 436 (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757, 106 S.Ct. 2169, 2177, 90 L.Ed.2d 779 (1986)). Assuming all facts alleged in the complaint and found by the district court to be true, and drawing all reasonable inferences in plaintiffs' favor, we must conclude that, as a matter of law, Proposition 209 does not

violate the United States Constitution. With no constitutional injury on the merits as a matter of law, there is no threat of irreparable injury or hardship to tip the balance in plaintiffs' favor.

For the foregoing reasons, we vacate the preliminary injunction, deny the motion to stay the injunction as moot, and remand to district court for further proceedings consistent with this opinion.

Preliminary injunction VACATED; stay DENIED as moot; REMANDED.

APPENDIX B

COALITION FOR ECONOMIC EQUITY, et al., Plaintiffs,

v.

Pete WILSON, et al., Defendants.

No. C 96-4024 TEH.

United States District Court,

N.D. California.

Dec. 23, 1996.

Class of persons adversely affected by amendment to State Constitution that prohibited government entities from using race- and gender-conscious affirmative action programs sued class of government officials challenging constitutionality of amendment. The District Court, Thelton E. Henderson, Chief Judge, after granting temporary restraining order (TRO) enjoining state officials from implementing the amendment, 1996 WL 691962, considered motion for preliminary injunction, and held that: (1) plaintiff class had standing; (2) *Seattle-Hunter* doctrine, that facially neutral enactments that single out race and gender issues for unique political burdens are suspect classifications under equal protection clause, applied; (3) plaintiff class established likelihood of success on equal protection claim; (4) plaintiff class demonstrated likelihood of success on claim that amendment was preempted as "obstacle" to Title VII; (5) plaintiff class failed to demonstrate likelihood of success on merits of claim that amendment was preempted as obstacle to other civil rights statutes; (6) plaintiff class demonstrated likelihood of imminent irreparable injury; (7) balance of hardships

tipped in favor of plaintiff class; and (8) public interest favored granting of injunction.

Injunction granted.

Edward M. Chen, American Civil Liberties Union, Foundation of Northern CA Inc., San Francisco, CA, Mark D. Rosenbaum, David S. Schwartz, Taylor Flynn, Silvia Argueta, Daniel Tokaji, ACLU Foundation of Southern California, Los Angeles, CA, William C. McNeill, III, Julian A. Gross, Employment Law Center, Legal Aid Society of S.F., San Francisco, CA, Stewart Kwoh, Julie Su, Asian Pacific American Legal Center of Southern CA, Los Angeles, CA, Evan H. Caminker, University of California at Los Angeles, School of Law, Los Angeles, CA, Eva J. Paterson, Theodore Hsien Wang, Lawyers Committee For Civil Rights of San Francisco Bay Area, San Francisco, CA, Julie Goldscheid, Martha F. Davis, NOW Legal Defense and Education Fund, New York, NY, Karl M. Manheim, Loyola Law School, Los Angeles, CA, Abby J. Leibman, California Women's Law Center, Los Angeles, CA, Judith E. Kurtz, Equal Rights Advocates, Inc., San Francisco, CA, Joseph S. Avila, Avila & Putnum, Los Angeles, CA, Elliot M. Mineberg, People For the American Way, Washington, DC, Christopher F. Edley, Jr., Harvard Law School, Cambridge, MA, Brad Seligman, The Impact Fund, Berkeley, CA, for The Coalition for Economic Equity, California NAACP, Northern California NAACP, AFL-CIO, Council of Asian American Business Associations, CA, Chinese American Citizens' Alliance, Women Construction Business Owners and Executives, California Chapter, United Minority Business

Entrepreneurs, Chinese for Affirmative Action, Black Advocates in State Service, Asian Pacific American Labor Alliance, LaVoz Chicana, Black Chamber of Commerce of California, Michelle Bennett, Nancy Burns, Floyd Chavez, Christopher Clay, Dana Cunningham, Iran Celeste Davila, Shevada Dove, Jessica Lopez, Virginia Mosqueda, Salvador Ochoa, Clifford Tong.

Glenn Rothner, Ellen Greenstone, Rothner Segall & Bahan, Pasadena, CA, for California Labor Federation.

Linda Cabatic, CA State Atty. General, Sacramento, CA, for Pete Wilson, Daniel E. Lungren, Joanne Corday Kozberg, James Gomez.

Joseph R. Symkowick, CA State Dept. of Education, Sacramento, CA, Joanne Lowe, Deputy General Counsel, Sacramento, CA, for Delaine Easton.

C. Ellen Pilsecker, Ian Fan, San Diego, CA, for San Diego County.

Victor J. Westman, County Counsel, Martinez, CA, Phillip S. Althoff, Martinez, CA, for Contra Costa County.

Thomas G. Hendricks, County Counsel's Office, San Rafael, CA, for Marin County.

Nicholas George-Rodriguez, Lawrence S. Newberry, Tracy Webb, City Attorney's Office, Pasadena, CA, for City of Pasadena.

Manuel S. Klausner, Kindel & Anderson, Los Angeles, CA, Sharon L. Browne, Mark T. Gallagher, Pacific Legal Foundation, Sacramento, CA, Michael A.

Carvin, Charles J. Cooper, Cooper & Carvin, Pllc., Washington, DC, for Californians Against Discrimination and Preferences, Inc.

Colleen M. Rohan, San Francisco, CA, for Amicus Curiae Meiklejohn Civil Liberties Institute.

Manuel S. Klausner, Kindel & Anderson, Los Angeles, CA, Donna G. Matias, Institute for Justice, Washington, DC, for Amicus Curiae Institute for Justice, Women's Freedom Network, Campaign for a Color-Blind America, Center for Equal Opportunity, U.S. Pan-Asian American Chamber of Commerce Education Foundation, Pacific Research Institute, Center for New Black Leadership, Claremont Institute.

Christopher M. Patti, University Of California, Office of the General Counsel, Oakland, CA, for Richard C. Atkinson.

Tina L. Rasnow, Tina L. Rasnow & Associates, Westlake Village, CA, for Amicus Curiae California Women Lawyers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE PRELIMINARY INJUNCTION

THELTON E. HENDERSON, Chief Judge.

I. INTRODUCTION

This action presents a challenge to the constitutionality of newly-enacted Article 1, section 31 of the California Constitution. This measure, which appeared on the ballot as Proposition 209, was passed by the California electorate on November 5, 1996. It provides in relevant part as follows:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

CAL. CONST. art. 1, § 31(a).[1]

It is important to note at the outset that much of this language simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act. These laws have long-guaranteed all persons "equal protection of the law," and prohibited discrimination in employment and in any program or activity receiving federal assistance.[2] This aspect of Proposition 209 – which creates no change in existing law – is not at issue in this case. Indeed, it could hardly be more clear that a law that merely affirms the non-discrimination principles in our Constitution is, itself, constitutional.

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[1] For the sake of brevity, the Court will use the term "race" to cover all of the categories identified in Proposition 209 other than sex.

[2] The Fourteenth Amendment and § 7(a) of the California Constitution both provide that no person may be denied "the equal protection of the laws." Titles VI and VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-e et seq. prohibit, respectively, discrimination in any project or activity receiving federal financial assistance on the basis of race, and in employment on the basis of race and sex. As the ballot argument in favor of Proposition 209 noted, the initiative "restates the historic Civil Rights Act." Pls. Exh. 2.

It is also undisputed that the Constitution precludes voluntary, government-sponsored race and gender "preferences" except in the most limited circumstances. Thus, government entities were already barred, prior to Proposition 209, from using race-conscious "preferences," e.g. race-conscious affirmative action programs, unless they could pass the most exacting "strict scrutiny" required by the Fourteenth Amendment. Under this test, only those programs that are "*narrowly* tailored" and "*necessary* to break down patterns of *deliberate* exclusion" perpetuated by the enacting agency are permitted. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509, 109 S.Ct. 706, 730, 102 L.Ed.2d 854 (1989) (emphasis added).[3] Quotas are not permitted. *See, e.g., Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Gender-based programs, under existing law, are also subject to a heightened level of scrutiny. *U.S. v. Virginia*, ___ U.S. ___-___, ___, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996).

In short, Congress and the courts had already prohibited discrimination, and sharply constrained government use of race and gender preferences, long before Proposition 209 was enacted on November 5, 1996. The parties do not dispute, however, that the people of California meant to do something more than simply restate existing law

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[3] The city of San Francisco, for example, adopted a race- and gender-conscious affirmative action program after finding that it was necessary to counter established discriminatory practices, including "old boy networks," that prevented minority and women contractors from obtaining city contracts. *Associated Gen. Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1413-18 (9th Cir.1991).

when they adopted Proposition 209. It is this "something more" that is the focus of this action.

To be sure, the outer boundaries of this "something more" have yet to be determined. It is clear, however, that the primary change Proposition 209 makes to existing law is to close that narrow but significant window that permits the governmental race- and gender-conscious affirmative action programs described above that are still permissible under the United States Constitution. Notably, defendants agreed at oral argument that Proposition 209 prohibits at least some of these constitutionally permissible programs. They also failed to identify any other programs that would be affected by Proposition 209.

It is thus essential to keep in mind that plaintiffs' constitutional challenge to Proposition 209 is not, in fact, a facial challenge to the entire initiative. Rather, it is much narrower in scope: it is a challenge only to that slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race- and gender-conscious affirmative action programs.[4]

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[4] We note that while the exact relationship between the terms "affirmative action" and "preferences" has yet to be determined, the following is clear. First, the term "preferences" includes, at a minimum, programs or policies that use racial or gender classifications. Second, the term "affirmative action" is generally understood to include, at a minimum, programs designed to remedy the continuing effects of past and/or present discrimination which contain a race- or gender-conscious component. The term "affirmative action" as used in this decision is intended to refer to such programs. However, to

Plaintiffs assert that this specific aspect of Proposition 209 violates the United States Constitution on two separate grounds. First, they allege that Proposition 209, although couched in neutral terms, violates the Fourteenth Amendment's equal protection guarantee of "the right to full participation in the political life of the community." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467, 102 S.Ct. 3187, 3193, 73 L.Ed.2d 896 (1982); *see also Romer v. Evans*, ___ U.S. ___, ___, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996) ("Central . . . to our own Constitution's guarantee of equal protection is the principle that government in each of its parts remain open on impartial terms to all who seek its assistance."). Proposition 209 violates this guarantee, they argue, because it restructures the political process in a nonneutral manner. Specifically, it erects unique political hurdles only for those seeking legislation intended to benefit women and minorities – who must now obtain a constitutional amendment – while allowing those seeking preferential legislation on any other ground unimpeded access to the political process at all levels.

Second, plaintiffs allege that Proposition 209 violates the Supremacy Clause of the United States Constitution because it interferes with Congress' intent that employers be afforded the option of utilizing constitutionally permissible race- and gender-conscious affirmative action to

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ensure clarity on this point, and because the term "affirmative action" may be used in other contexts to refer to programs that are not race- or gender-conscious, the Court will generally use the longer, but more precise, phrase "race- and gender-conscious affirmative action" to refer to programs affected by Proposition 209.

comply with their obligations under Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.

The immediate issue before the Court is whether plaintiffs[5] have satisfied their burden of demonstrating that defendants[6] should be preliminarily enjoined from enforcing or implementing Proposition 209 pending a final determination of the merits of this action. In weighing this matter, the Court is mindful that any challenge to a duly-enacted law should be met with caution and restraint. It is not for this or any other court to lightly upset the expectations of the voters. At the same time,

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[5] Pursuant to this Court's Order of November 25, 1996, plaintiffs represent a class of all persons or entities who, on account of race, sex, color, ethnicity, or national origin, are or will be adversely affected by Proposition 209's prohibition of affirmative action programs operated by the State of California, any state or municipal agency, or any other political subdivision or governmental instrumentality of the State of California. The plaintiff class is represented by named plaintiffs Coalition for Economic Equity, California NAACP, Northern California NAACP, California Labor Federation, AFL-CIO, Council of Asian American Business Associations, California Chinese American Citizens' Alliance, California Chapter of the Women Construction Business Owners and Executives, United Minority Business Entrepreneurs, Chinese For Affirmative Action, Black Advocates in State Service, Asian Pacific American Labor Alliance, La Voz Chicana, Black Chamber of Commerce of California, and several named individuals.

[6] Pursuant to this Court's Order of December 16, 1996, defendants represent a class of all state officials, local government entities or other governmental instrumentalities bound by Proposition 209. The defendant class is represented by named defendants Governor Pete Wilson and Attorney General Daniel Lungren.

our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution.

Thus, the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights. Without a doubt, federal courts have no duty more important than to protect the rights and liberties of all Americans by considering and ruling on such issues, no matter how contentious or controversial they may be. This duty is certainly undiminished where the law under consideration comes directly from the ballot box and without the benefit of the legislative process. As the Supreme Court aptly noted in another socially-charged case:

> Nor does the implementation of . . . change through popular referendum immunize it [from constitutional scrutiny]. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

Hunter v. Erickson, 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969).

It also cannot be overemphasized that this case does not call upon this Court to adjudicate whether affirmative action is right or wrong, or whether it is no longer an appropriate policy for addressing the continuing effects of past and present discrimination against racial minorities and women. Such questions, while they are most certainly of vital public policy interest, lie beyond the purview of this Court. Nor does this case implicate the

ability of governmental entities to voluntarily repeal affirmative action policies, as the Regents of the University of California did earlier this year.

Rather, the substantive issues raised by this action are considerably more narrow, albeit no less important: whether the particular *method* chosen by Proposition 209 to curtail affirmative action is unlawful because it either (1) violates the rights of women and minorities to fully participate in our political system or (2) interferes with Congressional goals embodied in Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

In the discussion that follows, this Court first addresses the question of whether plaintiffs have standing to bring this action. The Court then turns to the appropriate standard governing plaintiffs' motion for a preliminary injunction, which is followed by this Court's Findings of Fact and Conclusions of Law, with respect to that motion, as required by FED.R.CIV.P. 65.

Based on these Findings and Conclusions, this Court rules that:

(1) Plaintiffs have standing to bring this action.

(2) Plaintiffs have demonstrated a probability of success on their claim that Proposition 209 violates the Fourteenth Amendment's equal protection guarantee to full participation in the political life of the community.

(3) Plaintiffs have failed to demonstrate a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is thus

preempted by, Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972.

(4) Plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is thus preempted by, Title VII of the 1964 Civil Rights Act.

(5) Plaintiffs have demonstrated that a preliminary injunction is necessary to protect the plaintiff class from the possibility of irreparable injury.

Accordingly, the Court grants plaintiffs' Motion for Preliminary Injunction, and enjoins defendants, pursuant to the injunction following these Findings and Conclusions, from enforcing and implementing Proposition 209 pending trial or final judgment in this action.

II. STANDING

A "threshold question in every federal case [is] whether the plaintiff has stated a 'case or controversy' between himself and the defendant within the meaning of Article III." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The core component of whether a case or controversy under Article III exists is the doctrine of standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984). The Supreme Court has established three elements necessary to meet the Article III standing requirement. First, the plaintiff must have suffered an "injury in fact" – "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' . . . and the injury or threat of injury must be both 'real and

immediate,' not 'conjectural' or 'hypothetical.' " *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). Second, the injury must be a result of the challenged conduct. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) ("The injury has to be 'fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.' "). Finally, a plaintiff must show a likelihood that a favorable decision will redress the injury. *Id.*

Here, defendants assert that none of the plaintiffs shows an imminent threatened injury. Notwithstanding the limitations imposed by article 3, section 3.5 of the California Constitution,[7] however, Proposition 209 is a self-executing amendment to the California Constitution that imposes an affirmative duty to comply. "In this circumstance compliance is coerced by the threat of enforcement, and the controversy is both immediate and real." *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 508, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972).

Plaintiffs have shown a real and immediate threat of injury. Proposition 209 is clearly applicable to statutes and programs that are currently benefitting the named

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[7] Section 3.5 of Article 3 of the California Constitution provides that an administrative agency is without power to declare a statute unconstitutional unless an appellate court has first made a determination that the statute is unconstitutional. Thus, state agencies may not declare a state statute invalid under Proposition 209, or otherwise refuse to enforce a state statute based on Proposition 209, absent a state appellate court ruling that the statute is unconstitutional.

plaintiffs and it is virtually certain to be enforced. The amendment was recently enacted and is not a statute that has lain dormant for years and likely to remain moribund. *See Poe v. Ullman*, 367 U.S. 497, 501, 81 S.Ct. 1752, 1754-1755, 6 L.Ed.2d 989 (1961). Further, the Governor has already made moves to employ article 1, section 31, to invalidate certain state statutes in a pending civil action. *Wilson v. State Personnel Board*, 96-CS01082 (App. to File Mot. to Amend, Nov., 6 1996). Moreover, a conflict between the plaintiffs' interests and the challenged amendment is inevitable. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-305, 99 S.Ct. 2301, 2308-2312, 60 L.Ed.2d 895 (1979) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."); *cf. Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215-1216, 39 L.Ed.2d 505 (1974) (a plaintiff need not first expose himself to actual arrest or prosecution before challenging the constitutionality of a criminal statute).

The constitutional injury asserted by the plaintiffs is directly connected to the actions of the defendants. *See S. v. D.*, 410 U.S. 614, 618, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923)) ("The party who invokes judicial power must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as a result of a statute's enforcement."). Two of the defendants, and now class representatives, the California Governor and Attorney General, are explicitly charged with the task of enforcing the laws of the state. The other defendants are governmental entities that are

under a duty to apply the amendment to existing statutes, ordinances, and regulations. Plaintiffs have shown that they will suffer the alleged constitutional injury when any one of the defendants enforces the constitutional amendment.

Finally, since the constitutional injury to the plaintiffs is allegedly caused by the enforcement of Proposition 209, plaintiffs' requested remedy, a declaration that the Proposition is unconstitutional and unenforceable, would unquestionably address the plaintiffs' alleged injuries. *See Allen v. Wright*, 468 U.S. 737, 753, n. 19, 104 S.Ct. 3315, 3325, n. 19, 82 L.Ed.2d 556 (1984) (the redressability requirement "examines the causal connection between the alleged injury and the judicial relief requested").

By demonstrating imminent injury attributable to the actions of the defendants that will be redressed by a favorable decision by this Court, plaintiffs have met the requirements for standing under the Article III "case or controversy" clause.[8]

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[8] At the outset, this Court must address defendants' contention that these proceedings should be stayed under the "*Pullman* abstention" doctrine. *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). After having carefully reviewed the circumstances that defendants have forwarded in support of their request for abstention, this Court chooses not to abstain. Defendants have not presented an interpretation of challenged state law that this Court, in its discretion, believes warrants abstention. This Court, however, will revisit this area and consider all subsequent developments and arguments when it considers defendants' regularly noticed motion to abstain scheduled for January 6, 1997.

III. PRELIMINARY INJUNCTION STANDARD

According to Ninth Circuit precedent, in order to obtain a preliminary injunction, the moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the movant. *Associated General Contractors*, 950 F.2d at 1410. These formulations are not different tests but rather two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases. *Id.* In considering a request for a preliminary injunction, a court must remain mindful that such relief is aimed primarily at preserving the status quo pending trial. *See Los Angeles Mem. Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980) ("fundamental principle" governing preliminary injunctive relief is the need to maintain the status quo prior to determination on the merits). Under either formulation of the test, a court, in balancing the harms, must also take into account any public interests implicated by the injunctive relief sought. *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988).

Because the plaintiffs here allege that they suffer constitutional injury at the hands of Proposition 209, the Court must evaluate the merits of their constitutional claims before it can meaningfully address the irreparability and imminence of any harm. *See Bery v. City of New York*, 906 F.Supp. 163, 166 (S.D.N.Y.1995) (where constitutional injury is alleged, "the two prongs of the threshold showing required for injunctive relief merge

into one"), *rev'd on other grounds*, 97 F.3d 689 (2d Cir.1996).

IV. FINDINGS OF FACT

The following Findings of Fact are based on the preliminary record presently before the Court.

A. Characterization of Proposition 209

After qualifying as an initiative constitutional amendment, Proposition 209 was placed on the California general election ballot for November 5, 1996.

Prior to the election, each registered voter received an official California Ballot Pamphlet prepared by the non-partisan California Legislative Analyst's Office ("LAO").[9] This Pamphlet, which provided an official description and analysis of each statewide initiative, portrayed Proposition 209 as a measure that would eliminate race- and gender-conscious affirmative action programs in the public sector.[10] Accordingly, the California Ballot Pamphlet explained to voters that:

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[9] The Legislative Analyst is required, pursuant to the California Elections Code, to prepare a "concise summary" of the general meaning of each initiative as well as an analysis. CAL.ELEC.CODE §§ 9085-86.

[10] In formulating this description, the LAO extensively reviewed materials pertaining to Proposition 209, including "documents from proponents and opponents, journal articles, media coverage, legislative hearings, numerous conversations with proponents, opponents, government officials and other experts." Pls. Exh. 2, Taylor Decl. ¶ 2.

> A **YES** vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A **NO** vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

Pls. Exh. 2 (emphasis in original).

In addition to this brief summary, the Ballot Pamphlet also provided voters with a more extensive analysis of Proposition 209, which underscored that the initiative would effectively eliminate race- and gender-conscious affirmative action programs. Specifically, the LAO explained Proposition 209 and its effects as follows:

> [F]ederal, state, and local governments run many programs intended to increase opportunities for various groups – including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. . . .
>
> If [Proposition 209] is approved by the voters, it could affect [the following programs]. . . .
>
> **Public Employment and Contracting**
>
> The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs,

where sex, race, or ethnicity are preferential factors in hiring, promotions, training or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. . . .

Public Schools and Community Colleges

[T]he measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. . . . Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools), and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities. . . .

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin. . . .

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University ("CSU") uses race and ethnicity as factors in

> some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. . . .

Id. (emphasis in original). As the above reflects, the only programs identified by the LAO as potentially affected by Proposition 209 are race- and gender-conscious affirmative action programs.

The California Ballot Pamphlet also included partisan arguments submitted by proponents and opponents of the initiative. These arguments further established that the issue at stake in Proposition 209 was the continuation of public sector race- and gender-conscious affirmative action programs. The Argument In Favor Statement begins by instantly focusing the reader on the issue of affirmative action:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.

Pls. Exh. 3. The next paragraph quotes the facially-neutral language of the initiative but then immediately returns to the issue of affirmative action, with a particular emphasis on race-conscious affirmative action:

> "REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG!. . . . [S]tudents are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the

> preferred RACE . . . Proposition 209 will stop [these] terrible programs. . . .

Id. (emphasis in original).[11]

The Argument Against Statement also focused attention on Proposition 209's impact on affirmative action programs beneficial to women and minorities. The argument warns that:

> Proposition 209 will eliminate affirmative action programs . . . that help achieve equal opportunity for women and minorities. . . .

and concludes by stating that Proposition 209:

> poses as an equal opportunities initiative, but . . . [it] puts at risk every outreach program, sets back the gains made by women and puts

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[11] Ward Connerly, co-signer of this ballot argument, also made it clear in his public statements that Proposition 209 was intended to end affirmative action programs. In March 1996, for example, Connerly explained to reporters why he had decided against trying to end racial preferences in the University of California's ("UC") outreach programs for high school students and financial aid criteria: "Connerly said Wednesday that UC had already been torn apart by his successful push last summer to end racial preferences in admissions and hiring, and that affirmative action programs in California schools would most likely be banned anyway by [Proposition 209]. 'What do I gain by going ahead and forcing a showdown . . . [?] The public's going to end affirmative action in November.' " Pls. Exh. 4. Governor Wilson, another co-signor of the ballot initiative, also told reporters in March of 1995 that although the California Legislature was unwilling to "confront the issue of reverse discrimination arising from affirmative action programs . . . the people of California will get that opportunity at the ballot box." *Id.*

> the brakes on expanding opportunities for people in need.

Id. (quoting General Colin Powell).

B. Election Results and Response by Defendants

On November 5, 1996, the voters of California enacted Proposition 209 into law, with 4,736,180 votes (54%) cast in favor of the initiative and 3,986,196 votes (46%) cast in opposition.[12] Because the initiative is by its terms self-executing, public entities around the State faced the immediate question of implementation. Three of the defendants in this action responded by quickly acting to implement and enforce Proposition 209. On November 6, 1996, Governor Wilson issued an Executive Order (W-136-96) requiring state agencies to promulgate implementing regulations and identify all state statutes and programs pertaining to employment, education or contracting that grant or encourage preferences based on

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[12] The racial and gender breakdown of the vote was as follows:

VOTER	YES(%)	NO(%)
Male	61%	39%
Female	48%	52%
White	63%	37%
Black	26%	74%
Latino	24%	76%
Asian	39%	61%

Pinkus Decl. and attachment. As the above reflects, none of the above groups voted entirely for or against Proposition 209. However, "White voters were the only racial or ethnic group supporting 209." *Id.*

race, sex, color, ethnicity or national origin.[13] That same day, Attorney General Lungren instructed state agencies to comply immediately with Proposition 209 to the extent permitted by California law.[14] The University of California also promptly took steps to implement Proposition 209. *See* Dec. 6, 1996 Order at 2.[15] Other defendants expressed uncertainty and confusion regarding the appropriate response to the initiative. *See* Response of Defendant City of Pasadena to Plaintiffs' Request for Temporary Restraining Order at 2 ("[C]omplex questions now exist about how to reconcile the competing and seemingly conflicting requirements of federal, state and

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[13] Prior to the November election, Governor Wilson filed suit in Sacramento Superior Court (96-CS01082) against state agencies challenging the constitutionality of certain affirmative action programs. After the election, Governor Wilson promptly moved to amend his suit to include Proposition 209 as a basis for invalidating the challenged programs. On November 14, 1996, the California Court of Appeal ruled that the amendment could not be made pending resolution of a writ petition on a judicial disqualification order. However, Governor Wilson intends to add a Proposition 209 claim to the case "at the earliest available opportunity." Defendants' Supplemental Memorandum in Opposition to Motion for Preliminary Injunction at 5 n. 2.

[14] We also note that on November 25, 1996, the Governor and Attorney General both declined to agree to a moratorium on actions to enforce Proposition 209 pending further proceedings in this case. *See* Order Re Temporary Restraining Order, November 27, 1996, at 6.

[15] Given the self-executing nature of Proposition 209, all other members of the defendant class are also required to implement Proposition 209 immediately. *See* CAL. CONST. art. 1, § 31(h).

local affirmative action policies. These are issues which this City cannot resolve on its own.").

C. Effect of Proposition 209 on Affirmative Action Programs

Any California public entity that implements Proposition 209 is required to end voluntary race- and gender-conscious affirmative action programs in three areas: contracting, employment, and education. We thus briefly review each of these areas in turn.[16]

1. Contracting

Race- and gender-conscious affirmative action programs in California in the area of public contracting have taken various forms, from requiring that prime contractors make good-faith efforts to utilize women- or minority owned subcontractors to providing an advantage in evaluating bids. These programs are designed to address the continuing effects of past or present bias against the use of women- and minority-owned contractors on public sector projects. According to the evidence before the

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[16] The record in this case includes references to a range of affirmative action programs currently in effect in California. Some of these programs have been subjected to judicial challenge and found to be constitutionally permissible. *See, e.g., Assoc. General Contractors v. Coalition for Econ. Equity*, 748 F.Supp. 1443 (N.D.Cal.1990), *aff'd*, 950 F.2d 1401 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992). Others have never been challenged. With respect to these latter programs, the Court does not, of course, make any judgment with respect to their constitutionality.

Court, their effect has been to provide such contractors with substantial opportunities not previously available.

The experience of Antonio Ruiz provides one such example. Mr. Ruiz owns Ruiz Construction Company & Associates which engages in general engineering and construction work. Amended Ruiz Decl. filed in support of *amicus* ¶ 2. It is Mr. Ruiz' experience that "contractors accept the bids of those contractors with whom they have established ties." *Id.* ¶ 8. In 1985, Ruiz qualified to participate in the city of San Francisco's voluntary affirmative action program, which was adopted to remedy past discriminatory practices by the city in its letting of contracts. Prior to this time, Ruiz was unable to "get many large contractors to even accept [his] bids for subcontract work," and he in fact had obtained "only one contracting job with the City." ¶¶ 7-8. By participating in the City's affirmative action program, he was able to break through the old patterns of doing business and obtain subcontracts. ¶¶ 10-11. The exposure he gained led to additional business with prime contractors, and allowed him to build his business substantially and "form joint ventures to bid as a prime contractor on City contracts." ¶¶ 12-14. *See also* Fung Decl. ¶ 4 (affirmative action in public contracting has reduced discrimination against Asian American contractors and made it possible for them to bid competitively for public contracts); Wu Decl. at 144-145 (affirmative action in public contracting has substantially benefitted Asian Americans); Burns Decl. ¶ 4 (women-owned painting and wallpapering company benefitted substantially from San Francisco affirmative action contracting program); Chavez Decl. ¶¶ 3-4 (describing how affirmative action in public contracting

programs allowed him to break through the "old boy network" and obtain public contracts); Larson Decl. ¶ 16 (disparities between the availability of women- and minority-owned contractors and their use by public agencies "are noticeably reduced where government agencies implement affirmative action policies"), ¶ 20 (after Los Angeles adopted affirmative action programs, percentage of women businesses obtaining city contracts increased from 0.3% to 8% and percentage of minority businesses obtaining city contracts increased from 2% to 11.8%).

The record further demonstrates that implementation of Proposition 209 would substantially reduce opportunities in public contracting for women and minorities. Larson Decl. ¶ 17 (discussing studies showing that race or gender neutral programs designed to address underutilization of minority and women contractors were generally ineffective), ¶ 21; Chavez Decl. ¶ 5 (estimating that absent affirmative action program "his firm would lose up to 50 to 75% of" its public contracting work); Leonard Decl. ¶ 15 (discussing a study finding "not only a stagnation but a reversal of advances" for African-Americans under "weak" affirmative action programs).

2. Employment

Race- and gender-conscious affirmative action programs in California in the area of public employment generally allow an employer to consider the ethnicity or gender of an otherwise qualified applicant as one of many factors. Some programs may also utilize hiring goals. Such programs are typically designed to address the continuing effects of past or present bias against the

hiring and/or promotion of women and minority employees. According to the evidence before the Court, their effect has been to provide such employees with substantial opportunities not previously available.

The use of voluntary affirmative action in California's civil service provides one such example. In 1971, then-Governor Ronald Reagan issued an Executive Order establishing voluntary affirmative action in the California civil service. Bielby Decl. ¶ 4. Subsequently, state agencies and departments began using hiring goals and timetables in an effort to correct the existing underutilization of women and minorities.[17] As a consequence, the "index of gender and race segregation in state agencies" declined by 11 and 16 percent respectively between 1979 and 1986. ¶ 5. *See also* Newmann Decl. ¶ 7 (period from 1979-85 showed substantial statistical increases in the rate of female representation in the California "civil service and an even greater increase in nonwhite representation"); Badget Decl. ¶ 6 ("After state and federal governments began to require that state and local employers execute affirmative action plans in the early 1970s, the representation of Latino and black women increased dramatically as did access to managerial and professional jobs for all women of color."); Grillo Decl. ¶¶ 1-4 (affirmative action guidelines have been "very important" in

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[17] State civil service affirmative action programs "encourage some consideration of race, ethnicity and gender in hiring qualified civil service applicants and in choosing private firms to handle contracts for state services." California Senate Office of Research, The Status of Affirmative Action in California (1995), Pls. Exh. 5 at 2.

enabling women and minorities to gain civil service positions in California).

The record also indicates that implementation of Proposition 209 would substantially reduce opportunities for women and minorities in public employment.

3. Education

Race- and gender-conscious affirmative action programs in California in the area of public education range from voluntary desegregation and "magnet school" programs at the elementary school level to financial aid and admissions programs at the college and graduate school level. The evidence before the Court demonstrates that, overall, these programs have benefited minorities and women.

The University of California provides one example. Where the number of eligible applicants exceeds the spaces available, the University of California campuses select between 40 and 60% of students based upon their grades, test scores and course work. The remaining selections are made using a combination of criteria including California residence, physical and learning disabilities, educational disadvantage, family income, ethnicity, leadership ability, public service, special athletic, artistic or musical ability, composition of a student's family (whether student comes from a single- or two-parent family) and a student's family's college history (whether student is first-generation college bound).

Under this system of admissions, the racial composition of the total University of California freshman class for the Fall of 1994 was as follows:

	number	percentage
American Indian	214	.96
African American	968	4.35
Latino	3,313	14.87
Filipino	949	4.26
Asian	7,191	32.28
White/other	9,643	43.28
total:	22,278	100.00

Conrad Decl. ¶ 15.

The record indicates that, without the present race- and gender-conscious affirmative action efforts, the number of African American enrollments "could be reduced across the system by as much as 40 to 50 percent while Chicano/Latino enrollments could be reduced by 5 to 15 percent. . . . American Indian enrollments could be reduced by 40 to 50 percent. Filipino enrollments could increase by 5 percent or decline by 5 percent." Pls. Exh. 7 at i. On the other hand, Asian American enrollments would increase by 15 to 25 percent. White enrollments would likely remain roughly the same. *Id.*[18]

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[18] An analysis of the estimated effects of Proposition 209 on enrollments at just the U.C. Berkeley campus showed similar results. Specifically, it estimated that African American enrollment would drop from 222 (6.5%) in the 1995 class to 85-119 (2.5-3.5%) in the 1998 class, Latino enrollment would drop from 531 (15.6%) to 205-287 (6-8.4%); Native American enrollment would drop from 63 (1.8%) to 20-28 (6-8%), Asian American enrollment would increase from 1268 (37.2%) to 1516-1582 (44.5-46.4%), and White enrollment would increase from 1,018 (29.9%) to 1116-1164 (32.8-34.2%). Pls. Exh. 13.

The above estimates may well understate the actual decreases that would occur over time. As acceptance rates fall for African American, Latino and American Indian students, the applicant pool from these groups may fall as well, since high school students consider the probability of admission when deciding where to apply for college.

The record also suggests that, absent race- and gender-conscious admission programs, the admissions of African American, Latino, and American Indian students at California's public medical schools will significantly decrease. This in turn is likely to have a negative effect on the delivery of health care services in those communities. "On average, black physicians care for nearly six times as many black patients and Hispanic physicians care for nearly three times as many Hispanic patients as other physicians." Conrad Decl. ¶ 37; Drake Decl. ¶ 5.

D. Impact of Proposition 209 on the Political Process

Prior to the passage of Proposition 209, anyone seeking to petition his or her government representatives to adopt, amend, or retain race- or gender-conscious affirmative action programs faced the same burdens as those faced by any constituent seeking preferential treatment for any group in the area of contracting, employment or education.[19] Typically, this burden involves directly

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[19] This would include, for example, constituents seeking preferential treatment for veterans or the disabled in employment, for local businesses in contracting, or for athletes, artists or California residents in admissions to public schools.

petitioning and lobbying the specific representatives or policymakers with authority to adopt such programs. Such programs can generally be approved by simple majority vote or by executive decision. *See e.g.* Hernandez Decl. ¶ 5 (describing constituents' successful effort to convince city of San Francisco to adopt affirmative action program to remedy discriminatory practices in city contracting). In other cases, a local initiative process may be required.

After the passage of Proposition 209, women and minorities who wish to petition their government for race- or gender-conscious remedial programs face a considerably more daunting burden.[20] Before such persons can approach their school district, city council, county government, or any other subdivision of government with such a proposal, they must first obtain an amendment to the California Constitution that would either (a) repeal Proposition 209, or (b) permit the specific government entity at issue to adopt a particular race- or gender-conscious affirmative action program.

The California Constitution can be amended through either an initiative constitutional amendment or a legislative constitutional amendment. Either method places a heavy burden on those seeking to advocate the use of constitutionally-permissible affirmative action programs in their local communities.

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[20] Defendants have not questioned the substantial evidence before the Court showing that women and minorities continue to face the effects of past and present discrimination and thus will continue to have an interest in using the political process to seek remedial action through affirmative action programs.

Under the first method – an initiative constitutional amendment – sponsors must first obtain signatures supporting the initiative equal to 8% of the previous gubernatorial vote. In 1996, this required the collection of 693,230 valid signatures. Cain Decl. ¶ 4. Since many signatures are disqualified, in order to ensure the requisite number of valid signatures, approximately 50% more "raw" signatures must be collected. Zimmerman Decl. ¶ 8. Because these signatures must be collected within a 150-day time limit, a campaign must typically collect up to 7,000 signatures during each of the 150 days. *Id.* ¶ 9. Given these requirements, and the size of California, hiring paid signature gatherers is a virtual necessity. The cost of obtaining signatures runs from $0.70 to $1.50 per signature. *Id.* ¶ 10. Thus, even where volunteers gather some portion of the required signatures, the cost of securing sufficient signatures, and minimally staffing a few offices, can run from $500,000 to $1.5 million. *Id.* ¶ 11; Cain Decl. ¶ 6. Once the initiative has qualified, it must gain majority approval by the voters.

Under the second method – legislative constitutional amendment – sponsors must secure a two-thirds vote of approval by both the California Senate and Assembly. A majority of the voters must then approve the amendment at the next statewide election.

In either case, substantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval. Again, the size of California makes this endeavor particularly expensive. To reach at least 10 million voters directly, a campaign would have to talk to 1,000 voters each day for 30 years. Zimmerman Decl.

¶ 12. Campaigns must thus generally reach voters through television, radio, print advertising, and direct mail. According to the California Commission on Campaign Financing, $109 million was spent on statewide initiatives on the 1990 ballot. Cain Decl. ¶ 6. The campaign in support of Proposition 209 had spent $3.1 million by October 1996. Cain Decl. ¶ 6.

As a result of the new political-process hurdles erected by Proposition 209, members of the plaintiff class are effectively precluded from petitioning local and state policymakers and representatives to adopt, maintain, or expand race- or gender-conscious affirmative action programs. For example, the Coalition for Economic Equity (Coalition), a named plaintiff in this action, has proposed fifteen amendments to the City of San Francisco's affirmative action policy. Members of the Coalition have met with City Supervisors in preparation for a vote on the proposed legislation by the entire San Francisco Board of Supervisors. The Coalition is now precluded from further pursuing this legislation through the normal political channels that were available prior to the adoption of Proposition 209.

V. CONCLUSIONS OF LAW

A. Likelihood of Success on Plaintiffs' Equal Protection Claim

"The Equal Protection Clause of the 14th Amendment guarantees racial minorities the right to full participation in the political life of the community." *Seattle,* 458 U.S. at 467, 102 S.Ct. at 3193. This guarantee applies with equal force to women. *United States v. Virginia,* ___ U.S. at ___,

116 S.Ct. at 2275. The Equal Protection Clause not only prohibits the outright exclusion of women and minorities from the political process, but also prohibits more subtle distortions of the political process. *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193. In the words of the Supreme Court, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.* at 476, 102 S.Ct. at 3198 (quoting *Hunter*, 393 U.S. at 393, 89 S.Ct. at 561-562).

Plaintiffs argue that Proposition 209, despite its facial neutrality, violates the Equal Protection Clause because it restructures the political process to disadvantage only those seeking to enact legislation intended to benefit minorities and women. Relying on the Supreme Court opinions in *Seattle* and *Hunter*, plaintiffs emphasize that prior to the enactment of Proposition 209, supporters of race- and gender-conscious affirmative action programs were able to petition their state and local officials directly for such programs. After the passage of Proposition 209, however, these same advocates face the considerably more daunting task of mounting a statewide campaign to amend the California Constitution. At the same time, those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status, continue to enjoy access to the political process at all levels of government. Plaintiffs thus maintain that Proposition 209 denies them the equal protection of the laws by removing the authority to redress racial and gender problems – and only those problems – to a new and remote level of government, thereby singling out the

interests of minorities and women for a special political burden.

For the reasons noted earlier, the Court in testing Proposition 209 against the Equal Protection Clause focuses on a relatively narrow question: does Proposition 209's prohibition of constitutionally-permissible race- and gender-conscious affirmative action violate plaintiffs' right to equal protection of the laws?

1. Does the *Seattle-Hunter* Doctrine Apply?

Plaintiffs rely primarily on two Supreme Court cases, *Hunter* and *Seattle*, to support their equal protection claim. "These cases yield a simple but central principle. . . . [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. [But] the State [may not] allocate governmental power nonneutrally by explicitly using the racial nature of a decision to determine the decisionmaking process." *Id.* at 470, 102 S.Ct. at 3195.

In *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), the Supreme Court addressed the efforts of citizens of Akron, Ohio, to overturn duly-enacted legislation prohibiting racial discrimination in housing. After the city council adopted a fair housing law, the citizens by referendum amended the city charter to require that fair housing ordinances be put to a city-wide vote before they could take effect. This requirement, set out in § 137 of the charter, not only affected future fair housing efforts, but also reached back to suspend the

previously-enacted ordinance. *See id.* at 387, 89 S.Ct. at 558-559. The Supreme Court found that § 137 singled out local legislation of special interest to minorities for a unique political burden; while those seeking to enact ordinances regulating real estate on any basis other than race merely had to persuade the Akron City Council, "for those who sought protection against racial bias, the approval of the City Council was not enough." *Id.* at 390, 89 S.Ct. at 560. The Supreme Court ultimately concluded that Akron's restructuring of the political process violated the 14th Amendment.

The Supreme Court's analysis of § 137 turned on two particular features of the measure. First, § 137 raised equal protection concerns because it singled out an issue of particular interest to racial minorities – racial discrimination in housing. Had the measure imposed a new political burden on all legislation, the Supreme Court was quick to point out, it would not have run afoul of the 14th Amendment. *Id.* at 393-95, 89 S.Ct. at 561-563 (Harlan, J., concurring). Second, § 137 was suspect because it imposed a novel political burden on all future efforts to enact fair housing legislation. Had the citizens of Akron used the referendum process simply to repeal the fair housing ordinance previously adopted by the Akron City Council, this action alone would have raised no equal protection difficulty. *Id.* at 390 n. 5, 89 S.Ct. at 560 n. 5; *see also Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-19. Although neither of these two features of § 137, standing alone, would have offended the 14th Amendment, the Supreme Court held that the confluence of the two factors – the targeting of a racial issue and the reordering of the

political process – constituted a racial classification that required the most exacting judicial scrutiny.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), the Supreme Court reaffirmed its ruling in *Hunter*, applying the rationale of that case to a statewide initiative designed to prohibit the mandatory busing of students to achieve racial integration in schools. After a Seattle school district took steps to establish a mandatory busing plan, the voters of Washington passed Initiative 350, which provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." *Id.* at 462, 102 S.Ct. at 3190-3191. Three school districts that had previously initiated busing efforts challenged the initiative in court, and these challenges ultimately presented the Supreme Court with an "extraordinary question: whether an elected school board may use the Fourteenth Amendment to defend its program of busing for integration from attack by the State." *Id.* at 459, 102 S.Ct. at 3189 (emphasis in original).

Despite its facially neutral language, the Supreme Court found that Initiative 350 in reality barred only busing plans aimed at achieving racial integration while permitting busing for other purposes. In striking down the initiative, the Court found that it, like the enactment in *Hunter*, singled out an issue of concern to minorities – racial busing – and imposed special political burdens on those who supported the issue. These features of Initiative 350 led the Court to find that the facially-neutral measure was, in reality, a racial classification subject to

the most searching judicial scrutiny. *Id.* at 485, 102 S.Ct. at 3202-3203. In the words of the Court, "It is beyond dispute . . . that the initiative was enacted 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration." *Id.* at 471, 102 S.Ct. at 3195. As in *Hunter*, the Supreme Court concluded that, viewed in this light, Initiative 350 violated the 14th Amendment.

Before the Court applies these precedents to the case at bar, it notes that Proposition 209 shares several characteristics with the measures struck down in *Hunter* and *Seattle*. All three initiatives are facially neutral. All three grew from controversial efforts aimed at rolling back legislative gains that were intended as remedies for historical discrimination suffered by particular groups. Perhaps most importantly, in the wake of all three measures, those seeking to reenact such remedies could no longer use the same political mechanisms that had been available prior to the passage of the enactments.

As plaintiffs themselves concede, however, one difference between *Seattle* and *Hunter* and the matter at bar is readily apparent: *Seattle* and *Hunter* exclusively address racial issues,[21] whereas Proposition 209 addresses both race and gender preferences. Defendants urge this Court not to import the Supreme Court's *Seattle* and *Hunter* reasoning into the context of gender.

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[21] The referendum at issue in *Hunter* also burdened the interests of religious minorities, *see* 393 U.S. at 386, 89 S.Ct. at 558, but the Supreme Court's analysis of § 137 focused primarily on its racial component, *see id.* at 391, 89 S.Ct. at 560-561.

The Supreme Court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship status." *United States v. Virginia*, ___ U.S. at ___, 116 S.Ct. at 2275. Because "our Nation has had a long and unfortunate history of sex discrimination," equal protection jurisprudence requires that gender classifications must survive heightened judicial scrutiny. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, ___, 114 S.Ct. 1419, 1425, 128 L.Ed.2d 89 (1994) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583 (1973)). Gender and racial classifications, however, do not receive identical treatment under the Equal Protection Clause; to date, the Supreme Court has reserved strict scrutiny for racial classifications. *United States v. Virginia*, ___ U.S. at ___ n. 6, 116 S.Ct. at 2275 n. 6. Gender classifications, meanwhile, are subject to less stringent intermediate scrutiny review. *Id.* at ___, 116 S.Ct. at 2274.

The differing levels of judicial scrutiny accorded race and gender classifications, however, do not render the reasoning of *Seattle* and *Hunter* inappropriate in the context of gender. On the contrary, the doctrinal approach of those cases is wholly consonant with the heightened scrutiny applicable to gender classifications. When a measure is challenged under the Equal Protection Clause, a court is required, as a threshold matter, to determine whether the challenged measure contains a race or gender classification. *See Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, ___, 115 S.Ct. 2097, 2105, 132 L.Ed.2d 158 (1995) (noting that presence of a race classification made the

Arlington Heights intent analysis unnecessary); *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 273-74, 99 S.Ct. 2282, 2293-2294, 60 L.Ed.2d 870 (1979) (noting different equal protection analysis when no explicit gender classification is present). It is this threshold question that the *Seattle-Hunter* analysis is meant to answer. Only after concluding that a racial classification was involved did the Supreme Court in *Seattle* and *Hunter* proceed to subject the challenged enactments to strict scrutiny. *Seattle*, 458 U.S. at 485, 102 S.Ct. at 3202-3203; *Hunter*, 393 U.S. at 391-92, 89 S.Ct. at 560-561. In the gender context, similarly, a court should first apply the *Seattle-Hunter* analysis to determine whether a gender classification exists, and then apply the appropriate intermediate equal protection scrutiny. It is precisely by applying the *Seattle-Hunter* doctrine in cases involving gender that a court fulfills its obligation to scrutinize gender classifications carefully.

Irrespective of the applicability of the rationale of *Seattle* and *Hunter* to gender, defendants maintain that the present case is not controlled by these precedents. Simply put, the defendants insist that because this case is different in kind from *Seattle* and *Hunter*, the *Seattle-Hunter* doctrine is wholly irrelevant.

First, defendants argue that Proposition 209, unlike the Washington and Akron initiatives, expressly prohibits classifications based on race and gender, and thus cannot be read to create such classifications. Defendants essentially ask this Court to read the plain language of Proposition 209, which concededly contains no classification on its face, and go no further. While it would certainly

streamline the inquiry, this approach is expressly disapproved in *Hunter* and *Seattle*. Despite the facial neutrality of the challenged enactments in both of those cases, the Supreme Court looked beyond the plain language of the measure in question and inquired whether, "in reality, the burden imposed by [the] arrangement necessarily falls on the minority." *Seattle*, 458 U.S. at 468, 102 S.Ct. at 3194 (emphasis added, internal quotations omitted); *see also Hunter*, 393 U.S. at 391, 89 S.Ct. at 560-561.[22]

Defendants' argument, moreover, asks this Court to overlook the central purpose of the *Seattle-Hunter* doctrine: to determine whether facially neutral enactments in reality rest on "distinctions based on race" or gender. *Seattle*, 458 U.S. at 485, 102 S.Ct. at 3202-3203. Defendants cannot use Proposition 209's facial neutrality as a shield against the application of the *Seattle-Hunter* analysis; it is precisely the measure's facial neutrality that makes application of those cases appropriate. *Compare id.* (applying *Hunter* to find that a facially neutral measure operated as a racial classification) with *Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-3219 (applying the *Hunter* analysis to find that a facially neutral measure did not embody a racial

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[22] Defendants' very argument, moreover, was before the Supreme Court in *Seattle*. As Justice Powell points out in his *Seattle* dissent, 458 U.S. at 491 n. 5, 102 S.Ct. at 3206 n. 5, Judge Wright, dissenting in the Ninth Circuit opinion in *Seattle*, concluded that "Initiative 350 does not treat persons differently on the basis of race." *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1351 (9th Cir.1980) (Wright, J., dissenting). This conclusion did not win the approval of the Supreme Court, however, which affirmed the Ninth Circuit majority.

classification). Defendants have simply mistaken the starting point of the equal protection analysis with its ending point.

Defendants next attempt to distinguish the *Seattle* and *Hunter* cases by shifting the focus of the inquiry from the initiatives themselves to the legislative efforts they effectively bar. From this standpoint, the defendants make two arguments that are variations on a single theme to distinguish *Seattle* and *Hunter* from the case at hand.

In the first argument, defendants contend that neither the mandatory busing programs barred by Initiative 350 nor the fair housing legislation barred by Akron's § 137 placed a burden upon the equal protection rights of nonminorities. Defendants insist that Proposition 209, in contrast, would outlaw preferences that by their very nature inflict injury on nonminorities. *See Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury. . . . "); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-83, 106 S.Ct. 1842, 1850-52, 90 L.Ed.2d 260 (1986) (opinion of Powell, J.) (discussing the burden placed on nonminorities by affirmative action programs aimed at remedying past discrimination). On this theory, Proposition 209 is distinguishable from the initiatives in *Seattle* and *Hunter* because it only interferes with "zero-sum" antidiscrimination efforts – those that help minorities, but do so at the expense of nonminorities.

The second argument focuses on the judicial scrutiny that attends the efforts banned by the challenged initiatives. According to defendants, the affirmative action

efforts prohibited by Proposition 209 are, under existing 14th Amendment principles, themselves constitutionally suspect and subject to heightened scrutiny. *See Adarand*, ___ U.S. at ___, 115 S.Ct. at 2117. The fair housing ordinance and the busing programs that were overturned by the initiatives in *Seattle* and *Hunter*, defendants argue, did not themselves trigger heightened equal protection scrutiny.

Defendants' proposed distinctions, although not implausible on their face, both fail for the same reason: nothing in *Seattle* or *Hunter* suggests that the Supreme Court holdings turned on these features of the challenged amendments.[23] If the application of the *Seattle-Hunter* doctrine to Initiative 350 turned on whether or not *Seattle*'s mandatory busing plan could be characterized as "zero-sum," as the defendants contend, the Supreme Court would presumably have addressed this difficult threshold issue. The opinion in *Seattle*, however, applied *Hunter* without examining whether mandatory busing presented a "zero-sum" scenario.[24] Similarly, the

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[23] The Court also notes that the defendants have not cited any authority addressing whether men suffer an equal protection injury of the sort set forth in *Adarand*, ___ U.S. at ___, ___, 115 S.Ct. at 2114, when a governmental body adopts a gender-conscious affirmative action program.

[24] The Court also notes that the language of Proposition 209 itself undermines defendants' proposed "zero-sum" distinction. Defendants urge that *Seattle* ought not apply where the challenged measure interferes only with "zero-sum" antidiscrimination efforts. By its terms, however, Proposition 209 prohibits *all* race and gender preferences, not merely those that operate in a "zero-sum" fashion. Consequently, Proposition 209's reach may extend beyond mere "zero-sum"

Supreme Court in *Seattle* expressly declined to reach the question of what level of equal protection scrutiny was applicable to *Seattle*'s busing plan. *Seattle*, 458 U.S. at 472 n. 15, 102 S.Ct. at 3196. Consequently, defendants' contention that *Seattle*'s holding turns on the scrutiny applicable to Seattle's busing program is unpersuasive.

Defendants' view of Initiative 350, moreover, overlooks the raging controversy that surrounded the issue of mandatory busing in 1978 and that constituted the backdrop for the Supreme Court's decision in *Seattle*. *See Seattle Sch. Dist. No. 1 v. Washington*, 473 F.Supp. 996, 1005-10 (W.D.Wash.1979), *aff'd*, 633 F.2d 1338 (9th Cir.1980), *aff'd*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) (findings regarding the political controversy surrounding Seattle's busing efforts). It is evident that many who supported Initiative 350 felt that Seattle's busing plan benefited minority students at the expense of the majority. This is borne out by the fact that shortly after the implementation of the plan, four school board members who supported the plan narrowly avoided recall. *Seattle*, 458 U.S. at 460 n. 1, 102 S.Ct. at 3189 n. 1. As a result, defendants' conclusion that the busing plan in *Seattle* did not burden majority interests is, at best, both factually and legally ambiguous. *Id.* at 495 n. 9, 102 S.Ct. at 3208 n. 9 (Powell, J., dissenting) (suggesting that busing aimed at desegregation might, in fact, be viewed as burdensome to nonminority students).

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antidiscrimination efforts. Put another way, Proposition 209 itself appears to be oblivious to the very distinction urged by defendants on its behalf.

Finally, defendants' focus on the particular legislation barred by Initiative 350, Akron's § 137, and Proposition 209, rather than on the initiatives themselves, suffers from a more fundamental flaw. Accepting defendants' arguments would essentially require that this Court read *Seattle* and *Hunter* as cases about the limits on state-sponsored remedies for past discrimination. This is the inevitable conclusion that emerges from a primary focus on the legislation blocked, rather than on the blocking initiative. As this Court has pointed out, however, the instant case, as well as *Seattle* and *Hunter*, are more appropriately understood as cases about access to the political process.

Because the *Seattle-Hunter* doctrine is designed to determine whether facially neutral enactments single out race and gender issues for unique political burdens, and thus are suspect classifications, defendants' efforts to distinguish *Seattle* and *Hunter* must fail. If, in reality, Proposition 209 does not single out a racial or gender issue for unfavorable treatment in the political process, the initiative will emerge from the *Seattle-Hunter* analysis unscathed. *See Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-19 (simple repeal of antidiscrimination law raises no equal protection concern). If, on the other hand, Proposition 209's facial neutrality masks a racial or gender classification, the Equal Protection Clause requires that the measure be subjected to heightened scrutiny. *See Seattle*, 458 U.S. at 485, 102 S.Ct. at 3202-03. It is to this inquiry that this Court now turns.[25]

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[25] Counsel for defendants at oral argument suggested that, to the extent the present Supreme Court might not embrace the

2. Application of the *Seattle-Hunter* Doctrine

The *Seattle* opinion sets out the framework for analysis: if an "initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests," it must be examined for equal protection purposes as if it were a racial classification. *Id.* Keeping the earlier discussion regarding the extension of this analysis to the gender context in mind, the Court applies the *Seattle* test to Proposition 209.

a. Racial Focus

Just as the Supreme Court did in *Seattle*, this Court begins its analysis by asking whether Proposition 209, despite its facial neutrality, singles out an issue of special interest to minorities or women, and thus has a "racial [or gender] focus." *Id.* at 474, 102 S.Ct. at 3197.

In concluding that Initiative 350 had a racial focus, the Supreme Court relied in part on the perceptions of Washington voters. The Court found that despite Initiative 350's neutral language, proponents of the measure assured voters that it would affect only racial busing. *Id.* at 471, 102 S.Ct. at 3195-96. Given the nature of the

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rationale of *Seattle* and *Hunter*, this Court is not bound by those opinions. The Court does not so interpret the law, and thus declines to adopt defendants' argument. It is not for this Court to decide whether the Supreme Court might overturn its previous rulings. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) (lower court must follow Supreme Court precedent until it is overturned).

political campaign that surrounded its passage and the measure's practical effect, the Supreme Court had no difficulty joining the District Court and Court of Appeals in concluding that Initiative 350 was "effectively drawn for racial purposes." *Id.*

The record likewise suggests that the campaign for Proposition 209 had a racial and gender focus. As described in the Findings of Fact, the independent LAO, as well as the supporters and opponents of Proposition 209, characterized Proposition 209 as a referendum on race- and gender-conscious affirmative action. Named defendant Governor Pete Wilson himself signed the Argument in Favor statement, which opens with the following: THE RIGHT THING TO DO! A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. Pls. Exh. 2. Just as the voters of Washington perceived Initiative 350 as a referendum on busing, the evidence presently before the Court indicates that people of California viewed Proposition 209 as a referendum on affirmative action.

The Supreme Court, in evaluating whether Initiative 350 had a racial focus, also considered the enactment's practical effect. In *Seattle*, despite Initiative 350's non-racial language regulating student transportation, the practical effect of the measure was to prohibit only busing for racial integration, while leaving school districts free to employ busing for other purposes. *Seattle*, 458 U.S. at 474-75, 102 S.Ct. at 3197-98. Similarly, while Proposition 209's general language barring discrimination merely duplicates existing state and federal law, and thus does

not materially alter existing state practices, Proposition 209's prohibition on preferences will have a practical effect on existing programs. The California Legislative Analyst, for example, concluded that Proposition 209's ban on race and gender preferences would eliminate existing state and local race- and gender-conscious affirmative action efforts in contracting, employment, and education. Pls. Exh. 2. The defendants, moreover, despite repeated questioning by plaintiffs and the Court, have not yet identified a single existing program, other than race- and gender-conscious affirmative action programs, that would be affected by Proposition 209.[26]

While all parties concede that Proposition 209, at the very least, will prohibit race- and gender-conscious affirmative action efforts, it is equally plain that preferences unrelated to race and gender remain unaffected by Proposition 209. The University of California, for example, remains free after Proposition 209 to continue its practice of considering in its admissions decisions "California residence . . . , physical and learning disabilities, educational disadvantage, family income, and whether a student comes from a two-parent or single-parent family, is first-generation college bound or has special talents (for example, artistic or athletic ability) or experiences," Young

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[26] Counsel for defendant-intervenor CADP suggested at oral argument that there may be municipal programs granting preferences to certain ethnic groups that might be barred by Proposition 209. Aside from counsel's oral representation, however, the Court has nothing on the record from which to conclude that Proposition 209 has a substantial impact beyond the race- and gender-conscious affirmative action context.

Decl. ¶ 13. Thus, the primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education, and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender.

The opinion in *Seattle*, after concluding that the practical effect of Initiative 350 was to prohibit racial busing, addressed whether racial busing was an issue of special interest to minorities. Satisfied that Proposition 209 singles out race- and gender-conscious affirmative action, the Court turns to a similar question: is affirmative action an issue of special interest to minorities and women? The Court finds that the record fully supports plaintiffs' contention that state-sponsored race- and gender-conscious affirmative action "inures primarily to the benefit of the minority, and is designed for that purpose." *Seattle*, 458 U.S. at 472, 102 S.Ct. at 3196. As discussed in the Findings of Fact, plaintiffs have produced extensive evidence documenting the dramatic effect that affirmative action has had on the opportunities available to minorities and women in public contracting, employment, and education.

Defendant-intervenor CADP stresses that, in recent years, the effectiveness and wisdom of race- and gender-conscious affirmative action programs have been called into question. In particular, CADP notes that as California becomes increasingly heterogeneous, affirmative action programs designed to benefit one racial minority can actually harm the interests of another racial minority. This insight, however, has no bearing on the "racial

focus" inquiry mandated by *Seattle*. The fact that African Americans and whites could be found on both sides of the busing debate in that case did not prevent the Supreme Court from concluding that Initiative 350 addressed a racial issue. *Id.* at 472, 102 S.Ct. at 3196 (noting that "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350").

In any event, the "racial focus" inquiry set down in *Seattle* does not depend on the wisdom or efficacy of any particular affirmative action program. "In the absence of a constitutional violation, the desirability and efficacy" of race- and gender-conscious affirmative action "are matters to be resolved through the political process." *Id.* at 474, 102 S.Ct. at 3197. Rather, the question posed by *Seattle* is whether the issue in question is generally perceived as one of special interest to minorities and women, and if the issue has been singled out for unfavorable political treatment. As the Supreme Court held in *Seattle*, an enactment is unconstitutional if it "removes the authority to address *a racial problem* – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* (emphasis added). This Court has no trouble concluding that affirmative action is appropriately understood as "racial problem" and, similarly, a "gender problem" in the sense meant by the Supreme Court. *Id.* ("For present purposes, it is enough that minorities may consider busing for integration to be legislation that is in their interest.")

For the foregoing reasons, the Court is satisfied that plaintiffs have demonstrated that Proposition 209 "was enacted 'because of,' not merely 'in spite of,' its adverse

effects upon" affirmative action, and thus that the measure was effectively drawn for racial purposes.[27] *Id.* at 471, 102 S.Ct. at 3195-96.

b. Restructuring the Political Process

The Court next must ask whether Proposition 209 restructures the political process to the detriment of the interests of minorities and women.

The Supreme Court in *Seattle* addressed this issue by comparing the political burden faced by those seeking race-based busing with the burden faced by those seeking student assignment policies for nonracial reasons. Prior to the passage of Initiative 350, the state left virtually all matters of education policy, including busing to achieve integration, to local school boards. *Id.* at 477-82, 102 S.Ct. at 3198-3201. The Court found that, after Initiative 350, "[t]hose favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate." *Id.* at 474, 102 S.Ct. at 3197. Those interested in busing for other purposes, in contrast, could continue to petition their local school boards for such programs. The Court concluded that this

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[27] In so finding, the Court does not pass on whether any discriminatory intent lay behind the adoption of Proposition 209. The Supreme Court in *Seattle* made it plain that such an inquiry is not required under the *Seattle-Hunter* analysis. 458 U.S. at 484-86, 102 S.Ct. at 3202-03. The Court nevertheless notes that the Supreme Court in *Seattle* also suggested that any measure that ran afoul of the *Seattle-Hunter* analysis "inevitably raises dangers of impermissible motivation." *Id.* at 486 n. 30, 102 S.Ct. at 3203 n. 30.

restructuring of political authority imposed a "comparative burden . . . on minority participation in the political process." *Id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23.

In evaluating Proposition 209, this Court employs the same comparative approach utilized in *Seattle*. The defendants here concede that prior to Proposition 209, those seeking preferences – whether based on race, gender, disability, veteran status, economic disadvantage, age, residency, or any other basis – in public contracting, employment, and education could directly petition their state and local governmental entities for such preferential treatment. After the enactment of Proposition 209, those seeking race- and gender-conscious affirmative action must first mount a statewide campaign to amend the state constitution, while those seeking preferential treatment on all other grounds need not surmount any new political hurdle.

The record compiled by plaintiffs indicates that this changed political landscape imposes a substantial burden on the interests of women and minorities. The Coalition, for example, has been instrumental in persuading the City and County of San Francisco ("San Francisco") to adopt contracting ordinances that include race- and gender-conscious provisions designed to remedy the city's history of discrimination in contracting ("MWBE Ordinance").[28] Since the adoption of the MWBE Ordinance,

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[28] The MWBE Ordinance is codified at San Francisco Administrative Code § 12D and has been the subject of extensive litigation in this Court. *See, e.g., F.W. Spencer & Son, Inc. v. City and County of San Francisco*, C 95-4242 TEH; *Associated Gen. Contractors v. City and County of San Francisco*, 748 F.Supp.

the Coalition has continued to support the program, periodically proposing modifications designed to enhance its effectiveness and ensure its conformity with federal and state law.[29]

After Proposition 209, the doors of San Francisco government are closed to groups like the Coalition. The Coalition thus faces not only the prospect that San Francisco's MBWE Ordinance might fall to a court challenge brought under Proposition 209,[30] but also must embark on a statewide campaign to repeal or amend Proposition 209 if they are to enact any similar legislation in the future. As detailed in the Findings of Fact, the evidence before the Court indicates that this additional political hurdle is a high one: the Coalition would need to collect approximately 700,000 valid signatures to qualify an initiative, and then would have to mount an expensive

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1443 (N.D.Cal.1990), *aff'd*, 950 F.2d 1401 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992).

[29] As CADP notes, the Equal Protection Clause itself imposes a considerable burden on governmental entities seeking to adopt race- and gender-conscious affirmative action programs, and thus indirectly places a considerable burden on organizations like the Coalition that lobby for such programs. *See Associated Gen. Contractors*, 950 F.2d at 1413-18 (after examining San Francisco's MWBE Ordinance using exacting equal protection scrutiny, holding that the ordinance does not offend the 14th Amendment). What the Equal Protection Clause does not do, however, is force organizations like the Coalition to take their petition to "a new and remote" level of government, as does Proposition 209.

[30] San Francisco admits that legal challenges to its MWBE Ordinance based on Proposition 209 are imminent. The Court expresses no opinion on the merits of such a claim, should it ultimately be pressed by a party to this or any other suit.

statewide media campaign to persuade voters to vote in its favor at the polls. This political burden stands in stark contrast to the local effort the Coalition faced prior to the passage of Proposition 209.

The example of San Francisco's MWBE Ordinance also demonstrates that Proposition 209, like Initiative 350, burdens minority interests by indiscriminately eliminating even programs that do *not* arouse popular opposition. Despite Proposition 209's statewide victory, the voters of San Francisco opposed the measure by a margin of 70.5% to 29.4%.[31] In the words of the Supreme Court,

> In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation. This imposes direct and undeniable burdens on minority interests.

Seattle, 458 U.S. at 483-84, 102 S.Ct. at 3202 (internal footnote omitted); *see also Hunter*, 393 U.S. at 395-96, 89 S.Ct. at 562-63 (noting that § 137 has its real impact only where fair housing ordinances do not arouse opposition, because truly controversial measures would presumably be repealed via the existing referendum procedure).

In response to plaintiffs' showing regarding political burden, defendants insist that Proposition 209 in no way reorders the political process with respect to race and

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[31] The Court takes judicial notice of these figures. *See* San Francisco Elections Commission election summary, available at http://www.ci.sf.ca.us/election/update.htm.

gender preferences. In their view, the proper forum for addressing fundamental issues regarding individual rights has always been the state constitution, and Proposition 209 merely modifies the existing constitutional guarantee of equal treatment at the appropriate governmental level.

This argument has substantial merit with respect to Proposition 209's broad antidiscrimination provision – the general ban on invidious race and gender discrimination is certainly a matter of constitutional decisionmaking. As the Court has pointed out, however, it is Proposition 209's ban on preferences, not its general ban on discrimination, that is the focus of the instant suit. In this narrower context, defendants' argument falls short. Prior to the passage of Proposition 209, the discretion to adopt constitutionally-permissible race- and gender-conscious affirmative action programs was, as defendants' counsel conceded at oral argument, lodged with state and local government entities, not reserved at the constitutional level.

Moreover, the Supreme Court explicitly rejected defendants' argument in *Seattle*. In that case, Washington argued that it exercised plenary power over matters concerning public education, and that Initiative 350's ban on racial busing should thus be understood as change in policy by the body ordinarily charged with policymaking discretion. *Seattle*, 458 U.S. at 475-76, 102 S.Ct. at 3198. In rejecting this view, the Supreme Court emphasized that the issue was not whether the state had the power to ban race-based busing, but rather whether it had "exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests." *Id.* at 476

n. 18, 102 S.Ct. at 3198 n. 18. Similarly, in the instant case no one challenges California's power to modify its basic constitutional guarantees of individual rights. The "single narrow question" before this Court is whether the state has exercised that power in a manner that violates the 14th Amendment. *Id.*

The foregoing discussion also addresses defendants' contention that the present case is controlled by the Supreme Court's decision in *Crawford v. Board of Education*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), which was handed down on the same day as *Seattle*. That case involved a California constitutional amendment, Proposition 1, that the voters enacted in 1979. Proposition 1 aligned the authority of state courts to that of the federal courts with respect to court-ordered racial busing. In reviewing this initiative, the Supreme Court held that it merely repealed the prior constitutional language that had been interpreted to grant state courts more flexibility in ordering busing than was possessed by federal courts. *Id.* at 539, 102 S.Ct. at 3218-19. The Supreme Court further found that the repeal did not distort the political process – in the Supreme Court's view, what the people of California gave via the constitution, they chose to repeal via the same mechanism. *Id.* at 541, 102 S.Ct. at 3219-20; *id.* at 547, 102 S.Ct. at 3222-23 (Blackmun, J., concurring). Local school boards, which had been free to adopt certain busing programs aimed at desegregation, remained free after Proposition 1 to adopt such programs.[32] *Id.* at 535-536,

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[32] A number of such voluntarily adopted desegregation programs, in fact, may well be threatened by Proposition 209. *See* Pls.Exh. 8 (Los Angeles Unified School District, Fingertip

102 S.Ct. at 3216-17 (noting that this feature of Proposition 1 distinguished it from the initiative in *Seattle*).

As should be clear from the earlier discussion, the present case is dramatically different from *Crawford*. First, Proposition 209 cannot be characterized as a mere repeal. Proposition 209, by its terms, not only repeals all existing state and local affirmative action programs, but also prohibits the adoption of such programs in the future. In so doing, Proposition 209 displaces authority with respect to a race and gender issue to "a new and remote level of government," *Seattle*, 458 U.S. at 483, 102 S.Ct. at 3202, and thus reorders the political process to the detriment of women and minorities. Hence, rather than supporting defendants' position, *Crawford* underscores the troubling features of Proposition 209.

Because the Court finds, based on the foregoing, that Proposition 209 singles out an issue of special concern to minorities and women – race- and gender-conscious affirmative action – and alters the political process solely with respect to this issue, it concludes that the initiative "plainly rests on distinctions based on race." *Id.* at 485, 102 S.Ct. at 3203 (internal quotes omitted).

c. Heightened Scrutiny

Where a governmental enactment rests on a racial or gender classification, a court must expose it to "a most searching examination." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2111 (quoting *Wygant*, 476 U.S. at 273, 106 S.Ct. at

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Facts: Student Integration Services, 1995-96, Reference Guide No. 10 (Rev.)).

1846-47 (opinion of Powell, J.)). In examining race and gender classifications, however, the Supreme Court has employed two different standards, reserving the most exacting judicial scrutiny for situations involving race.[33] *United States v. Virginia*, ___ U.S. at ___ n. 6, 116 S.Ct. at 2275 n. 6. Because this Court finds that Proposition 209 fails to survive the lesser scrutiny due its inherent gender classification, it need not apply the more stringent strict scrutiny test.[34]

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[33] The Supreme Court has never squarely decided whether classifications based on gender are inherently suspect and thus deserving of strict scrutiny review. The rule drawn from the cases is that gender classifications must survive *at least* intermediate scrutiny. *See United States v. Virginia*, ___ U.S. ___, ___, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996) (gender classifications must clear "at least" intermediate scrutiny); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, ___ n. 6, 114 S.Ct. 1419, 1425 n. 6, 128 L.Ed.2d 89 (1994) (Court "need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 26, 114 S.Ct. 367, 373, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring) (noting that "it remains an open question whether classifications based on gender are inherently suspect") (citations and internal quotes omitted). Because Proposition 209 fails to survive intermediate scrutiny, this Court need not decide whether gender classifications are inherently suspect.

[34] Other courts have suggested that *Seattle* and *Hunter* can be explained as cases involving the fundamental right of all citizens to participate equally in the political process. *See, e.g., Evans v. Romer*, 854 P.2d 1270, 1279-82 (Colo.1993), *aff'd on other grounds*, ___ U.S. ___, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). On this theory, any law that infringed this fundamental right would be subject to strict scrutiny, regardless of the race or gender focus of the enactment. This Court's application of intermediate scrutiny to the gender classification inherent in Proposition 209 is not meant as a rejection of the fundamental rights approach.

In applying the intermediate scrutiny test appropriate to gender classifications, the Court is mindful of the Supreme Court's recent cases in this area. *See United States v. Virginia, supra; J.E.B. v. Alabama ex rel. T.B., supra.* According to the Supreme Court, "Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history." *United States v. Virginia,* ___ U.S. at ___, 116 S.Ct. at 2274. In order to survive this scrutiny, a gender classification must be supported by an "exceedingly persuasive justification." *Id.* at ___, 116 S.Ct. at 2275. The state has the burden of showing that the challenged classification "serves important governmental objectives" and that the means employed are "substantially related to the achievement of those objectives." *Id.*

In applying this demanding test, the Court asks a simple question: what important governmental interest is served by reordering the political process to the detriment of women's interests? With respect to this question, the defendants have not shouldered their burden. Defendants first suggest that Proposition 209 serves the important state interest of ending discrimination on the basis of race and gender. While undoubtedly important, however, this state interest is a non-sequitor with respect to Proposition 209. The Court fails to see how this purported interest is related to, much less justifies, the nonneutral reordering of the political process that is at issue in this case. As *Seattle* and *Hunter* make clear, it is *not* Proposition 209's prohibition on affirmative action that raises

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Rather, because the parties have not argued this issue, the Court expressly declines to pass on the merits of this theory.

equal protection concerns; rather, it is the reordering of the political process that triggers exacting judicial scrutiny. Defendants have not identified any feature of the prior political process that was discriminatory, and thus their invocation of a state interest in eliminating discrimination cannot justify the nonneutral reordering of that process.

The defendants also suggest that Proposition 209 serves an important state interest in avoiding liability under the 14th Amendment for affirmative action programs that have not yet been tested in court. As an initial matter, the Court notes that defendants have cited no cases suggesting that a state's abundance of caution can, by itself, constitute an important interest that would justify a gender classification. Even assuming that such an interest could justify a gender classification, Proposition 209 is a hopelessly overbroad means to that end. Proposition 209, far from being limited to affirmative action programs implemented by state agencies that have not been tested in court, prohibits all preferences, whether at the state or municipal level, and whether tested or untested in court.

3. Conclusion

The Court turns finally to defendants' *reductio ad absurdum* attack on the plaintiffs' equal protection argument. Defendants submit that the *Seattle* and *Hunter* cases cannot be read to invalidate Proposition 209, because such a reading would necessarily lead to an absurd reordering of the relationship between states and subordinate local government units. According to this argument, if

the Court accepts plaintiffs' position, such a holding would, in effect, permit local governmental bodies to preempt state authority on any racial or gender issue, at least where the local entity has acted to confer a benefit on minorities or women.

In making this argument, defendants rely primarily on concerns expressed by Justice Powell in his dissenting opinion in *Seattle*, 458 U.S. at 494-95, 498 n. 14, 102 S.Ct. at 3207-08, 3210 n. 14. As the majority in that case pointed out, however, the difficult dilemma posed by Justice Powell was not presented by Initiative 350. *Id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23. Similarly, the dilemma posed by defendants does not follow from plaintiffs' equal protection claim in the instant case. Nothing about plaintiffs' argument requires that the state of California be forever barred from addressing a race- or gender-conscious affirmative action program where a local authority has acted first. The *Seattle-Hunter* doctrine merely regulates the *manner* of any state intervention, preventing the state from nonneutrally reordering the political process to burden the interests of minorities or women. A state, for example, remains free to restructure the political process in a neutral manner, even where such a change indirectly burdens the political participation of women and minorities. A state may also intercede where it can articulate a justification that survives equal protection scrutiny. What a state may not do, according to the *Seattle-Hunter* doctrine, is single out an issue of special interest to minorities and women and require that such legislation run a unique political gauntlet.

Plaintiffs' argument does not require that, once supporters of race- and gender-conscious affirmative action have suceeded at the ballot box, their victory can never be undone. Nothing in the Constitution requires that the political system guarantee victory to those who support affirmative action. The body that enacts an affirmative action measure is free, of course, to repeal it.[35] *See Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-19. In short, those who support race- and gender-conscious affirmative action must compete within the neutral rules of the political process – the 14th Amendment expects that in the democratic struggle, the interests of minorities and women will sometimes prevail, and will sometimes be defeated. *See Hunter*, 393 U.S. at 394, 89 S.Ct. at 562 (Harlan, J., concurring) (noting that neutral rules structuring the political process "will sometimes operate in favor of one faction; sometimes in favor of another").

Once those who support race- and gender-conscious affirmative action prevail at one level of government, however, the Equal Protection Clause will not tolerate an effort by the vanquished parties to alter the rules of the game – solely with respect to this single issue – so as to secure a reversal of fortunes. Plaintiffs have borne their burden of showing that Proposition 209, by removing

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[35] The University of California, for example, has acted on its own accord to discontinue the use of race and gender preferences in admissions, contracting, and employment decisions. Pls. Exh. 11 (discussing Regents Resolutions SP-1 and SP-2). Governor Wilson has also issued an executive order repealing race- and gender-conscious affirmative action programs under his immediate control. Defendants' Request for Judicial Notice, Exh. 2 (Executive Order W-124-95, June 1, 1995).

authority over race- and gender-conscious affirmative action to "a new and remote" level of government, has precisely such an effect. Such a reordering of the political process is tantamount to vote dilution in the most literal sense: the relevant voting pool is effectively expanded until the prior victory is undone. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (holding that a state may not impair the voting rights of minorities under the guise of reapportionment). Where such a political restructuring is aimed at a subject of particular interest to minorities and women, it is particularly problematic, and the Equal Protection Clause demands that it be subjected to heightened judicial scrutiny. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense." *Romer v. Evans*, ___ U.S. ___, ___, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

For the reasons set forth above, the Court finds that plaintiffs have demonstrated a probability of success on the merits of their equal protection claim.

B. Likelihood of Success on Plaintiffs' Preemption Claims

1. Introduction

Plaintiffs assert that Proposition 209 violates the Supremacy Clause of the United States Constitution by proscribing governmental entities from voluntarily employing race- and gender-conscious affirmative action as a remedy for the effects of past and present discrimination. Plaintiffs base their contention on the hypothesis

that Congress intended to preserve voluntary affirmative action as a means to attain the goals embodied in three federal civil rights acts – Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[36] By outlawing race- and gender-conscious affirmative action, plaintiffs argue, Proposition 209 conflicts and interferes with the objectives of the three federal civil rights acts. Consequently, plaintiffs conclude that Proposition 209 must be invalidated by the Supremacy Clause of the United States Constitution.

Article VI of the United States Constitution states, in part, "[t]his Constitution and the Laws of the United States . . . shall be the supreme Law of the Land." In general, preemption is not to be lightly presumed under the Supremacy Clause. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689-90, 93 L.Ed.2d 613 (1987). Nevertheless, the Supremacy Clause has been interpreted to require preemption of state laws in certain circumstances.[37] The Supreme Court has

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[36] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d *et seq*. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e et seq. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681.

[37] Here, the state law being challenged under the Supremacy Clause is an amendment to the California Constitution, the most puissant of state laws; that fact however is irrelevant in a preemption analysis. Under the Supremacy Clause, "[t]he relative importance to the State of its own law is

enunciated two basic doctrines of preemption: conflict preemption and field preemption.

2. Preemption of State Law by Title VII
a. Field Preemption

Plaintiffs raise no field preemption claim and Congress plainly did not intend to "fill the field" of employment antidiscrimination law when it enacted Title VII. 42 U.S.C. § 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of state laws on the same subject matter . . . "); *See Guerra*, 479 U.S. at 282, 107 S.Ct. at 690.[38]

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not material when there is a conflict with federal law. . . . [a]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962).

[38] The doctrine of field preemption commands that a state law yield when it operates in an area where the " 'scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *English v. General Electric Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

b. Conflict Preemption

Conflict preemption bars the application of any state law that contravenes federal law. This type of preemption occurs when an individual or entity cannot simultaneously conform to state and federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963). When compliance with both federal and state law is impossible the state law must relent. *California v. ARC America Corp.*, 490 U.S. 93, 100, 109 S.Ct. 1661, 1664-65, 104 L.Ed.2d 86 (1989) (quoting *Florida Lime*, 373 U.S. at 142-143, 83 S.Ct. at 1217-1218).

State law is also preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). As under other forms of preemption, the ultimate touchstone of an obstacle preemption analysis is the Congressional purpose embodied in the federal legislation. *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 290, 106 S.Ct. 1057, 1063, 89 L.Ed.2d 223 (1986). Obstacle preemption, however, further requires a court to examine the methods Congress has chosen to achieve its purposes. To the extent a state law interferes with the manner in which Congress intended the federal law to operate, the state law is preempted – even where the state and federal laws share common goals. *Gade v. National*

Solid Wastes Management Ass'n., 505 U.S. 88, 103, 112 S.Ct. 2374, 2385-86, 120 L.Ed.2d 73 (1992).[39]

i. Actual Conflict Preemption

Plaintiffs contend that Proposition 209 is in actual conflict with Title VII. *See Florida Lime*, 373 U.S. at

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[39] The Court notes that many of the cases employing obstacle preemption involve federal laws in areas where Congress has so fully regulated that the courts could nearly conclude that Congress left no room for states to legislate. *See, e.g., Gade*, 505 U.S. at 104, n. 2, 112 S.Ct. at 2386, n. 2 ("Although we have chosen to use the term 'conflict' preemption, we could as easily have stated that the promulgation of a federal safety and health standard 'pre-empts the field . . . ' "); *Hines*, 312 U.S. at 66, 61 S.Ct. at 404 ("[F]ederal government, in the exercise of its superior authority in [the field of regulation of aliens] has enacted a complete scheme of regulation . . . "); *Gould*, 475 U.S. at 286, 106 S.Ct. at 1061 ("It is now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations."). It is apparent, however, that the application of obstacle preemption is not limited to circumstances where Congress has nearly filled the field. The Supreme Court has employed this form of preemption in fields where states are explicitly permitted to legislate. *See, e.g., Michigan Canners and Freezers Ass'n., Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2522-23, 81 L.Ed.2d 399 (1984) (Michigan Agricultural Marketing and Bargaining Act preempted by Agricultural Fair Practices Act (AFPA), despite the fact that AFPA reflects no congressional intent to occupy the field); *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (Wisconsin notice-of-claim statute interferes with the purpose of Congress in enacting § 1983); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985) (Payment in Lieu of Taxes Act preempts South Dakota statute which obstructs congressional purpose).

142-143, 83 S.Ct. at 1217-1218. To establish that an entity cannot simultaneously comply with both Title VII and Proposition 209, a plaintiff must demonstrate that some action required by Title VII simultaneously violates Proposition 209. Plaintiffs argue that, at times, voluntarily-adopted race- or gender-conscious remedies are the *sole* means of compliance with Title VII, and therefore Proposition 209 must be preempted under Florida Lime. Plaintiffs sole citation regarding this supposition is the First Circuit's review of the Boston Police Department's consent decree under the standard enunciated in *Croson*. *Stuart v. Roache*, 951 F.2d 446 (1st Cir.1991). While Stuart presents a factual predicate that likely could have served as the basis for a successful Title VII action, it is by no means obvious that the development of an affirmative action plan was the *only* alternative available that would have allowed the police department to avoid liability. *Cf.* 42 U.S.C. 2000e-2(j).

Plaintiffs further argue that Proposition 209 is in actual conflict with Title VII because that an entity might not be able to comply simultaneously with Proposition 209 and a court order pursuant to Title VII that mandates a race- or gender-conscious remedy.[40] Plaintiffs have not

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[40] Subdivision (d) of Proposition 209 permits race- and gender-conscious affirmative action pursuant to court orders and consent decrees predating the enactment of Proposition 209, but makes no exception for orders or consent decrees entered after the Proposition 209 effective date. CAL. CONST. art. 1, § 31(d) ("Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.").

demonstrated that the "actual conflict" preemption doctrine of Florida Lime applies with equal force when an entity cannot concurrently obey the dictates of state law and a court order pursuant to a federal law.[41]

ii. Obstacle Preemption

Plaintiffs further urge this Court to find that Proposition 209 runs afoul of the obstacle preemption doctrine because it interferes with the congressional purposes embodied in Title VII. Before this Court can find that Proposition 209 "stands as an obstacle" to the fulfillment of Congressional purposes, it must determine that one of those purposes was to preserve voluntary race- and gender-conscious affirmative action as an option for employers under Title VII. Merely showing that such affirmative action is *permissible* under Title VII is insufficient to support a finding of preemption. If Congress did not intend to preserve voluntary affirmative action as an option, and if such affirmative action is simply one of several equally effective means available to reach the

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[41] The Court's preliminary investigation of actual conflict preemption cases only reveals factual circumstances where an entity was trapped between a state and a federal law. No cases discussed the application of actual conflict preemption where an entity was unable to comply simultaneously with a state law and a remedy imposed by a court pursuant to a federal law. *See, e.g., Hook v. State of Ariz.*, 907 F.Supp. 1326, 1340-41 (D.Ariz.1995) (Court rejects defendants' defense that it was "legally impossible" to comply with federal court orders and an Arizona statute). For the foregoing reasons the Court finds that plaintiffs have not demonstrated a likelihood of success on the merits of their claim that Proposition 209 actually conflicts with Title VII.

goals of Title VII, banning voluntary affirmative action would not impede the realization of Congress' purpose.

While plaintiffs must demonstrate more than the *permissibility* of voluntary race- and gender-conscious affirmative action, they need not, as defendants suggest, show that affirmative action is *mandated* by Title VII. Rather, demonstrating either that (1) the discretion to utilize voluntary affirmative action is necessary to achieve the objectives of Congress or (2) such affirmative action is a method Congress intended to preserve under Title VII is sufficient to establish that the prohibition of affirmative action would interfere with Congressional intent.

The primary source of Congressional intent is the plain language of the statute. Unfortunately, the statutory language of Title VII fails to address whether Congress intended to preserve the option of utilizing voluntary race- and gender-conscious affirmative action. The sole reference to race- and gender-based preferences in Title VII simply indicates that Title VII should not be construed to *require* the adoption of preferences. 42 U.S.C. § 2000e-2(j) ("Nothing contained in this subchapter shall be interpreted to require any [entity] . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group . . . ").[42]

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[42] The Supreme Court's consideration of Congress' intent regarding affirmative action under Title VII has been limited to determining whether affirmative action is, at times, required under the statute and whether Title VII permits affirmative

Because Title VII is silent on the issue of Congress' intent regarding the role of voluntary race- and gender-conscious affirmative action under the Title VII schema, this Court must turn to the Equal Employment Opportunity Commission's ("EEOC") interpretation of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984) ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

The EEOC Guideline explaining the role of voluntary affirmative action under Title VII states: "Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." 29 C.F.R. § 1608.1(c). The EEOC guideline recognizes that

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action. *See, e.g., Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 644, 107 S.Ct. 1442, 1458, 94 L.Ed.2d 615 (1987) (Stevens, J., concurring) ("It remains clear that the Act does not *require* any employer to grant preferential treatment. . . . ") (emphasis in original); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979) ("We therefore hold that Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary affirmative action programs."); *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*, 478 U.S. 421, 464, 106 S.Ct. 3019, 3044, 92 L.Ed.2d 344 (1986) ("Our examination of the legislative policy behind Title VII leads us to conclude that Congress did not intend to prohibit a court from [ordering affirmative action in appropriate circumstances] . . . ").

Congress intended, as one of its central objectives, to encourage voluntary compliance with the statute. "The principle of nondiscrimination in employment . . . and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination . . . without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII." *Id.* The EEOC has thus concluded that permitting voluntary affirmative action is crucial if entities are to comply voluntarily with Title VII: "The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations – all of which emphasize voluntary action to achieve equal employment opportunity." 29 C.F.R. § 1607.17(1).

The EEOC guidelines, which were developed to clarify "uncertainty as to the meaning and application of Title VII, [which could] threaten the accomplishment of the clear Congressional intent to encourage affirmative action," 29 C.F.R. 1608.1(a), reveal that Congress intended to safeguard the discretion to employ voluntary race- and gender-conscious affirmative action as a means to allow "flexibility in modifying employment systems to comport with the purposes of Title VII." 29 C.F.R. 1608.1(c).

A court must give substantial deference to all enforcing agency's reasonable explications of a statute. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, ___, 115 S.Ct. 810, 813, 130 L.Ed.2d 740 (1995) ("It is well settled that courts should give great weight to any reasonable construction of a regulatory

statute adopted by the agency charged with enforcement of the statute."); *Chevron*, 467 U.S. at 845, 104 S.Ct. at 2783 (quoting *U.S. v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). Courts have not hesitated to show deference to agencies in the context of a preemption analysis. The Supreme Court, for example, in finding that a South Dakota statute was preempted by the federal Payment in Lieu of Taxes Act, gave "substantial deference" to the Department of Interior's construction of the federal statute. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985); *See also Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1284-1286 (9th Cir.1990) (court places significant reliance on Treasury Department's interpretation of ERISA to find that federal law does not preempt California Employment Development Department's withholding procedure); *California Hosp. Ass'n v. Henning*, 770 F.2d 856 (9th Cir.1985) (modified, 783 F.2d 946 (9th Cir.1986)) (relying on Department of Labor's regulation clarifying Congress' intentions in adopting ERISA, court finds that California statute not preempted.); *cf. Southern Pacific Transp. Co. v. Public Service Com'n of Nevada*, 909 F.2d 352, 356 (9th Cir.1990) (appellate court reverses district court's preemption analysis because "district court failed to accord sufficient deference to the Department of Transportation's construction of its own regulations").

The Supreme Court has generally given the same level of deference to the EEOC's interpretations of Title VII as it gives to other agency interpretations of statutes they are charged with enforcing. For example, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761, 99 S.Ct. 2066, 2074, 60 L.Ed.2d 609 (1979), the Supreme Court stated

that the EEOC guidelines are entitled to "great deference." *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280 (1975); *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339, 38 L.Ed.2d 287 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158 (1971). Those holdings were reaffirmed in *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 115, 108 S.Ct. 1666, 1671, 100 L.Ed.2d 96 (1988) ("It is *axiomatic* that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards . . . [it] need only be reasonable to be entitled to deference.") (emphasis added).[43]

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[43] In a subsequent case involving the EEOC guidelines, the Supreme Court drifted from its strong precedents requiring deference to agency interpretations. Justice Rehnquist, without reference to Commercial Office Products or the other post-Chevron holdings giving substantial deference to the EEOC guidelines, and solely drawing upon his own pre-Chevron opinion in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), determined that "the level of deference afforded [to an EEOC Guideline] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 257, 111 S.Ct. 1227, 1235, 113 L.Ed.2d 274 (1991). Justice Scalia, concurring, reproaches Justice Rehnquist for disregarding the Court's precedent: "In an era when our treatment of agency positions is governed by Chevron the *'legislative rules v. other action'* dichotomy of Gilbert is an anachronism; and it is not even a correct description of that anachronism to say that Gilbert held that the EEOC . . . is not entitled to deference." *Id.* at 260, 111 S.Ct. at 1236. For the

As explained below, the EEOC conclusion that Congress intended to preserve the option to utilize race- and gender-conscious affirmative action under Title VII surpasses the standard of reasonableness.[44] *See, e.g., Local*

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reasons that follow, this Court determines that, in this context, the EEOC Guidelines must be accorded, under the Arabian Oil test, the same substantial deference as required by Commercial Office Products. There is no evidence that the EEOC gave the two guidelines at issue here, which are comprehensive statements on Congress' intent regarding the use of affirmative action under Title VII, anything less than thorough consideration. The reasoning of the EEOC is coherent and is supported by the plain language and legislative history of the statute. In the thirty years since the passage of Title VII no agency interpretation of Title VII has drawn a conclusion inconsistent with those reached in the current EEOC guidelines. Finally the persuasive value of the guidelines at issued is enhanced by the fact that they function as a legal safe harbor for any person taking action in good faith reliance on the Guidelines. The Court finds that the EEOC Guidelines at issue here amply fulfil the requirements under Arabian Oil and must be given substantial deference.

[44] The proposition that the EEOC Guidelines are indicative of Congress' intent is strengthened by the fact that Congress has made no effort to modify or overturn the Guidelines in the twenty years following their promulgation. This does not suggest that Congressional inaction is somehow determinative; the Supreme Court, however, has "often taken Congress' subsequent inaction as probative to varying degrees." *Patterson v. McLean Credit Union*, 491 U.S. 164, 200, 109 S.Ct. 2363, 2385, 105 L.Ed.2d 132 (1989) (Brennan, J., concurring in part, dissenting in part). In the context of Title VII, the Supreme Court has noted that the barriers of the legislative process do not adequately explain a failure of Congress to act. "[W]hen Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so." *Johnson*, 480 U.S. at 629 n. 7, 107 S.Ct. at 1450 n. 7.

No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. at 516, 106 S.Ct. at 3072.

The EEOC's conclusion is based on a two-tiered rationale: (1) Congress intended voluntary compliance to be a purpose of Title VII, and (2) that the preservation of voluntary affirmative action is central to that compliance. The EEOC rationale is consistent with court decisions that have found that permitting voluntary compliance is integral to the purposes of Title VII. *Local No. 93*, 478 U.S. at 515, 106 S.Ct. at 3071 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."); Weber, 443 U.S. at 204, 99 S.Ct. at 2727-28 ("The very statutory words [were] intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' ").

The EEOC's corollary finding that voluntary affirmative action is not merely permissible, but essential to allow voluntary compliance is also buttressed by Supreme Court interpretation of Title VII. According to the Supreme Court, "the imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. . . . This result would clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.' " *Wygant*, 476 U.S. at 290, 106 S.Ct. at 1855 (O'Connor, J., concurring); *accord Local 93*, 478 U.S. at 516, 106

S.Ct. at 3072 (quoting EEOC guideline that states voluntary affirmative action must be "encouraged and protected" in the context of a finding that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII").

In sum, the EEOC Guidelines explicitly state that Congress intended to "encourage and protect" voluntary affirmative action as a method to achieve the objectives of Title VII. It is manifest from the Guidelines and the jurisprudence supporting their rationale that Congress meant to preserve the option to comply voluntarily with Title VII and that the capacity to utilize race- and gender-conscious affirmative action is fundamental to maintaining the potential of voluntary compliance. The EEOC's interpretation of Title VII compels this Court to find that Congress intended to preserve discretion for employers to utilize voluntary affirmative action.[45]

The Defendant-Intervenors argue that even if Congress intended to preserve the discretion to use race- and gender-conscious affirmative action under Title VII, Proposition 209 merely reflects California's decision not to exercise that discretion. The plain language of Title VII and the rationales behind voluntary affirmative action's role under the statute, however, necessitate the conclusion that Congress intended that the discretion to use race- and gender-conscious preferences be exercised employer level.

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[45] Recognizing the importance of the EEOC guideline in making this finding and the unique position held by the EEOC in interpreting Title VII, this Court invites the EEOC to submit an *amicus* brief.

Congress created the alternative to use voluntary affirmative action as a method of voluntary compliance with Title VII that would not engender further liability. As noted on several occasions by the Supreme Court, Title VII could potentially have put employers in the untenable position between Title VII liability for past acts of discrimination and Title VII liability for future preferences to remedy discrimination. *See, e.g., Wygant*, 476 U.S. at 291, 106 S.Ct. at 1856 (O'Connor, J., concurring) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken."); *Weber*, 443 U.S. at 210, 99 S.Ct. at 2730 (Blackmun, J., concurring) ("If Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.").

While the plain language of Title VII places employers between these equally perilous alternatives, voluntary affirmative action affords a safe passage. *See Johnson*, 480 U.S. at 645, 107 S.Ct. at 1459 (Stevens, J., concurring) ("The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing room' for employer initiatives to benefit members of minority groups."). It follows that Congress intended the persons or entities potentially liable under Title VII to be entrusted with the power to avail

themselves of the safe passage provided by voluntary affirmative action.[46]

This conclusion is supported by the legislative history of Title VII. When enacting Title VII, Congress chose neither to mandate nor prohibit the use of affirmative action; instead it decided to leave determinations regarding the appropriateness of affirmative action to persons making the day-to-day employment decisions. "[T]he problems raised by these controversial questions [surrounding preferential treatment and quotas in employment] are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *Weber*, 443 U.S. at 207 n. 7, 99 S.Ct. at 2729 n. 7 (quoting 110 Cong.Rec. 15893 (1964)); *Local 93*, 478 U.S. at 520, 106 S.Ct. at 3074 (quoting H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1962)) (noting that key support for Title VII was only obtained after it was apparent that "management prerogatives, and

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[46] Those liable under Title VII are limited to "employers." In general, an employer under Title VII is, at a minimum, a person who has a modicum of control over the statutorily required number of employees. *See Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500 (E.D.Va.1992) (For the purposes of Title VII, "employer" encompasses those persons who control aspects of individual's compensation, terms, conditions, or privileges of employment.); *Ryals v. Mobile County Sheriff's Dept.*, 839 F.Supp. 25 (S.D.Ala.1993) (Alabama County not employer of deputy sheriff under Title VII absent evidence that county had any control over any area of deputy's employment. Fact that county issued checks for deputies was insufficient to confer employer status.).

union freedoms [were] to be left undisturbed to the greatest extent possible").[47]

The State of California is not subject to employer liability under Title VII for all past and present discriminatory actions taken against all state, local, and municipal public employees in the state nor does the State of California make the day-to-day decisions regarding the public employees in California. As a result, Congress could not have intended that the State of California would be the appropriate body to exercise, on behalf of every individual public employer in California, the discretion to use voluntary race- and gender-conscious affirmative action.

c. Conclusion

In light of the EEOC Guideline and supporting case law, we conclude that Congress intended to protect employers' discretion to utilize race- and gender-conscious affirmative action as a method of complying with their obligations under Title VII. Proposition 209, by eliminating the discretion to utilize race- and gender-conscious affirmative action, contravenes this Congressional purpose. Further, Congress intended to allow employers to use affirmative action as a safe passage to compliance with Title VII. Proposition 209 obstructs the passageway

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[47] While these legislative comments occurred during the 1964 enactment of Title VII when it covered only private employers, "there is also no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector when Title VII was originally enacted." *Local* 93, 478 U.S. at 520 n. 10, 106 S.Ct. at 3074 n. 10.

and forces many employers into a place akin to the Strait of Messina where they confront the Scylla of Title VII and Charybdis of Proposition 209. Proposition 209, therefore, also contravenes Congress' intent regarding the use of affirmative action as a method to achieve the goals of Title VII.

For these reasons, this Court finds that plaintiffs have demonstrated a likelihood of prevailing on the theory that Proposition 209 violates the Supremacy Clause under the doctrine of obstacle preemption.[48]

3. Preemption of State Law by Titles VI and IX

Plaintiffs further contend that Proposition 209 violates the Supremacy Clause by interfering with the purposes and methods of Titles VI and IX. In order to establish a likelihood of prevailing on this theory, plaintiffs must show, just as they must show in the Title VII context, that Congress intended to accord voluntary race- and gender-conscious affirmative action a hallowed position within the structure of Titles VI and IX.

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[48] Subdivision (h) of Proposition 209 states "[i]f any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section." The Court recognizes that Title VII only applies to employment relationships, while Proposition 209 applies to employment, contracting, and education. It would be premature, however, to address questions regarding severance at this preliminary stage of the proceedings.

As in the Title VII context, nothing on the face of Titles VI or IX indicates that Congress intended to maintain voluntary affirmative action under the two statutes.[49] As noted above, where a statute is silent, a court must look for guidance from the agencies charged with enforcing the statute. Agency interpretations of Titles VI and IX have addressed some aspects of affirmative action, but have not reached the question of whether Congress intended the statutes to preserve the option of using voluntary affirmative action.

Agency regulations, on the one hand, state that in some instances, Title VI and IX regulations *require* the use of affirmative action, "[i]n administering a program which the recipient has previously discriminated against persons . . . the recipient must take affirmative action to

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[49] The legislative history of Title VI contains one reference to the importance of voluntary compliance with the statute, but does not address whether voluntary affirmative action is central to compliance with Title VI. *See* H.R.REP. No. 914(II), 88th Cong., 1st Sess. 25-26 (1964); H.R.REP. No. 914(I), 88th Cong. 1st Sess. 25 (1964). The Supreme Court has only examined affirmative action under Titles VI and IX in limited contexts. Two pluralities have held that Title VI is not violated by a constitutionally permissible affirmative action program. *Fullilove v. Klutznick*, 448 U.S. 448, 492 n. 77, 100 S.Ct. 2758, 2781 n. 77, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.); *id.* at 517, n. 15, 100 S.Ct. at 2794, n. 15 (Powell, J., concurring); *id.* at 517, n. 1, 100 S.Ct. at 2795, n. 1 (Marshall, J., concurring); Bakke, 438 U.S. at 287, 98 S.Ct. at 2746-47 (opinion of Powell, J.); *id.* at 341, n. 17, 98 S.Ct. at 2775 n. 17 (Brennan, J., concurring in part, dissenting in part). In the context of Title IX, the First Circuit recently determined that "[l]ike other anti-discrimination statutory schemes, the Title IX regime permits affirmative action." *Cohen v. Brown University*, 101 F.3d 155 (1st Cir.1996).

overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i); 34 C.F.R. § 106.3(a) ("[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex . . . such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

A showing that affirmative action is, at times, required under Title VI and IX cannot support a finding of preemption. Failure to comply with Titles VI and IX generally results in a cessation of federal funds. Consequently, affirmative action that is required by Titles VI and IX is permissible under Proposition 209. Cal. Const. art. 1, § 31(e) ("Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state."). Because Proposition 209 allows required actions under Titles VI and IX no conflict could transpire between actions required by the statutes and Proposition 209.

The regulations interpreting Title VI and IX also discuss the *permissive* use of affirmative action. "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(6)(ii); 34 C.F.R. § 106.3(b) ("[i]n the absence of a finding of discrimination on the basis of sex . . . a recipient may take affirmative actions to overcome the effect of conditions which

resulted in limited participation therein by persons of a particular sex.").

The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.

Recognizing the shortcomings of the typical sources of Congressional intent regarding the role of voluntary affirmative action under Titles VI and IX, plaintiffs attempt to employ interpretations of Title VII as a means to elucidate the legislative intent behind Titles VI and IX. It is apparent, however, that the intent and purposes of Titles VI and IX, which must be the central focus for preemption purposes, are not identical to those of Title VII. When Title VI was passed, "Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power. . . . Title VII and Title VI, therefore, cannot be read in pari materia" in all contexts. Weber, 443 U.S. at 206 n. 6, 99 S.Ct. at 2729 n. 6. Likewise, Title IX was enacted under Congress' spending power and also cannot be read as precisely parallel to Title VII.[50]

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[50] Plaintiffs footnote two Ninth Circuit cases and several regulations which adopt Title VII's disparate impact test in the

It is especially clear that plaintiffs cannot rely on Title VII to establish Congress' intent regarding Titles VI and IX in the context of affirmative action. The Supreme Court has already noted that Congress had differing intentions for what constitutes permissible affirmative action under the three statutes: "[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." *Johnson*, 480 U.S. at 632, 107 S.Ct. at 1452. Meanwhile, the constraints of Title VI parallel those established by the Constitution. *Bakke*, 438 U.S. at 285, 98 S.Ct. at 2745-46. Further, unlike under the Title VI paradigm, the standard for what constitutes permissible affirmative action under Title IX cannot be based on current Constitutional limitations.[51]

The statutory language, agency interpretation, and legislative history of Titles VI and IX do not establish that

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context of Titles VI and IX. *Larry P. v. Riles*, 793 F.2d 969 (9th Cir.1984); *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir.1994). While this may show that comparable actions will engender liability under Titles VI, VII, and IX, it does not reveal Congress' intent regarding the role of voluntary affirmative action under the three statutes.

[51] Congress' intent regarding affirmative action under Title IX was manifested when the statute was enacted in 1972 – well in advance of the currently controlling Constitutional standard of heightened scrutiny for gender classifications. *See U.S. v. Virginia*, ___ U.S. at ___-___, 116 S.Ct. at 2275-2276 (tracing history of heightened scrutiny for gender classifications). Consequently, unlike Title VI, where Congress intended to track the standards of the Fourteenth Amendment, Congress could not have intended to import the Fourteenth Amendment standards for gender into Title IX.

Congress intended to preserve voluntary race- and gender-conscious affirmative action as an option for entities covered by the two statutes. It is apparent, moreover, that plaintiffs cannot rely on the methods Congress chose to effectuate Title VII to establish that Proposition 209 is preempted by Titles VI and IX. Consequently, plaintiffs have failed to demonstrate to the Court a likelihood of success on the merits of their claim that Proposition 209 violates the Supremacy Clause because it stands as an obstacle to the methods Congress intended entities to employ in furthering the purposes of Titles VI and IX.

C. Irreparable Injury

As noted above, plaintiffs have demonstrated a probability of success on the merits of their equal protection claim. They have also demonstrated a likelihood of success on one of their preemption claims. Although some courts have held that this showing sufficiently demonstrates a possibility of irreparable harm, *see, e.g., Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir.1996), the Court will separately address this issue, focusing both on the irreparability and the immediacy of the harm alleged by plaintiffs.

Where the deprivation of a constitutional right is involved, courts generally hold that no further showing of irreparability is required. *See Associated Gen. Contractors*, 950 F.2d at 1412; 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1. The Court is satisfied, at least with respect to plaintiffs' equal protection claim, that the deprivation of a constitutional right – "the right to full participation in the

political life of the community" – is squarely at issue in the present case. *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193. To the extent Proposition 209 imposes a new and substantial political burden on those, and only those, who support race- and gender-conscious affirmative action, it inflicts an immediate and ongoing injury that is not amenable to monetary remedy. The very real threat that the enforcement and implementation of Proposition 209 may lead to the dismantling of existing, otherwise constitutional, affirmative action programs also constitutes an irreparable harm to members of the plaintiff class.

Turning to the imminence of the alleged injury, the Court is also satisfied that plaintiffs have shown that injury to members of the plaintiff class is not only possible, but almost certain, in the absence of a preliminary injunction. Proposition 209 is self-executing, and thus immediately binding on all state and local governmental units. The defendant class representatives, Governor Wilson and Attorney General Lungren, have, for their part, made plain their intention to implement Proposition 209 as expeditiously as possible, and have taken a number of preliminary steps to that end. The University of California system has also indicated its intention, in the absence of a preliminary injunction, to implement Proposition 209 immediately. Other members of the defendant class have also announced their intention, in the absence of an injunction, to modify their activities in accordance with Proposition 209. In addition, a number of private suits have been brought against defendant class members in state court challenging existing affirmative action programs, including suits brought by Governor Wilson and defendant-intervenor CADP. Perhaps

most importantly, the Court notes that the core equal protection injury identified by plaintiffs – impaired access to the political process at all levels of state and local government – would, in the absence of a preliminary injunction, be felt by the plaintiff class immediately.

The balance of hardships, moreover, tips decidedly in plaintiffs' favor. In contrast to the injury outlined above, a preliminary injunction would impose little hardship on members of the defendant class, who would merely be required to suspend their Proposition 209 implementation plans pending trial.[52]

The public interest also favors the entry of a preliminary injunction. As an initial matter, a number of named defendants have urged this Court to act swiftly and give clear guidance with respect to Proposition 209. This request, of course, is neutral with respect to the granting or denial of the present motion. Nonetheless, the Court believes the preservation of the pre-election status quo not only serves the public need for plain guidance, but also harmonizes that interest with the compelling interest in remedying discrimination that underlies existing constitutionally-permissible state-sponsored affirmative action programs threatened by Proposition 209.

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[52] Defendants argue that a state has a strong interest in seeing that legitimate enactments, especially at the constitutional level, not be stymied. Defendants certainly cannot, however, contend that the state has a strong interest in enforcing a measure that violates the United States Constitution. Because that is the very issue of the present suit, defendants invocation of this strong state interest is somewhat premature.

VI. CONCLUSION

Based on the foregoing Findings and Conclusions, this Court rules that:

(1) Plaintiffs have standing to bring this action.

(2) Plaintiffs have demonstrated a probability of success on their claim that Proposition 209 violates the Fourteenth Amendment's equal protection guarantee to full participation in the political life of the community.

(3) Plaintiffs have failed to demonstrate a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and thus is preempted by, Titles VI and IX of the 1964 Civil Rights Act.

(4) Plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and thus is preempted by, Title VII of the 1964 Civil Rights Act.

(5) Plaintiffs have demonstrated that a preliminary injunction is necessary to protect the plaintiff class from the possibility of irreparable injury.

Accordingly, and good cause appearing, it is HEREBY ORDERED pursuant to Fed.R.Civ.P. 65 that defendants Governor Pete Wilson and Attorney General Dan Lungren and all members of the defendant class that they represent, and their officers, agents, servants, employees and attorneys, and those in active concert or participation with them, are restrained and enjoined, pending trial or final judgment in this action, from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California

purports to prohibit or affect affirmative action programs in public employment, public education or public contracting.

The aforesaid preliminary injunction shall not preclude the following:

1. all defendants, including members of the defendant class, from identifying, reviewing and analyzing existing affirmative action programs.[53]

2. all defendants, including members of the defendant class, from defending private actions seeking remedies under Article 1, section 31 of the California Constitution.

3. proceedings in pending state court actions related to Article 1, section 31, including, *Wilson v. State Personnel Bd., Sacramento County Superior Court No. 96 CS01082* and *Californians Against Discrimination and Preferences, Inc. v. The Bd. of Governors of the Calif. Community Colleges*, Sacramento County Superior Court, No. 96 CS03010, and

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[53] The preliminary injunction does not, of course, interfere with the ability of any defendant or member of the defendant class to *voluntarily* adopt, retain, amend or repeal an affirmative action program. It does preclude any defendant or member of the defendant class from taking any action with respect to an affirmative action program in order to enforce, implement, or otherwise comply with, Proposition 209.

4. the California Attorney General from defending Article 1, section 31 in any legal proceeding challenging its validity under the United States Constitution.[54]

IT IS SO ORDERED.

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[54] Defendants have not requested that plaintiffs post a bond pursuant to FED.R.CIV.P. 65(c). This Court agrees that in this case it is appropriate to waive the bond requirement. *See generally Crowley v. Local No. 82*, 679 F.2d 978, 1000 (1st Cir.1982); *Canterbury Career School, Inc. v. Riley*, 833 F.Supp. 1097, 1106 (D.N.J.1993).

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE COALITION FOR ECONOMIC EQUITY; CALIFORNIA NAACP; NORTHERN CALIFORNIA NAACP; CALIFORNIA LABOR FEDERATION; AFL-CIO; COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, CALIFORNIA; CHINESE AMERICAN CITIZENS' ALLIANCE; WOMEN CONSTRUCTION BUSINESS OWNERS AND EXECUTIVES, CALIFORNIA CHAPTER; UNITED MINORITY BUSINESS ENTREPRENEURS; CHINESE FOR AFFIRMATIVE ACTION; BLACK ADVOCATES IN STATE SERVICE; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; LA VOZ CHICANA; BLACK CHAMBER OF COMMERCE OF CALIFORNIA; MICHELE BENNETT; NANCY BURNS; FLOYD CHAVEZ; CHRISTOPHER CLAY; DANA CUNNINGHAM; IRAN CELESTE DAVILA; SHEVADE DOVE, nfr Melodie Dove; JESSICA LOPEZ; VIRGINIA MOSQUEDA; SALVADOR OCHOA; CLIFFORD TONG,	)	Nos. 97-15030, 97-15031 D.C. No. CV-96-4024-TEH ORDER (Filed Aug. 21, 1997)

Plaintiffs/Appellees,

v.

PETE WILSON, Governor; DANIEL E. LUNGREN, Attorney General for the State of California; JOANNE CORDAY KOZBERG, Secretary of State and Consumer Services Agency and Cabinet Member; JAMES GOMEZ, Dir Dept of Corr,

Defendants/Appellants.

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor/ Appellant.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

The Opinion filed on April 8, 1997, is amended as follows:

1. On slip opinion page 3892, line 2 of caption, replace "LUNDGREN" with "LUNGREN."

2. On slip opinion, page 3897, line 1 of COUNSEL, insert "Daniel E. Lungren, Attorney General; Floyd D. Shimomura, Senior Assistant Attorney General; Linda A. Cabatic, Supervising Deputy Attorney General; Marsha A. Bedwell, Deputy Attorney General;" before "Paul H. Dobson. . . ."

3. On slip opinion, page 3898, replace lines 1-3 with "Michael A. Carvin, Charles J. Cooper, Michael W. Kirk, David H. Thompson, Cooper & Carvin, Washington, D.C.; Michael E. Rosman, Hans Bader, Center for Individual Rights, Washington D.C.; and Manuel S. Klausner, Los Angeles, California, for defendant-intervenor/appellant Californians Against Discrimination and Preferences, Inc."

4. On slip opinion, page 3898, replace lines 4-6 with "Mark D. Rosenbaum, Daniel P. Tokaji, ACLU Foundation of Southern California, Los Angeles, California; Edward Chen, ACLU Foundation of Northern California, San Francisco California; and Evan H. Caminker, UCLA School of Law, Los Angeles, California, for plaintiffs/appellees Coalition for Economic Equity, et al."

5. On slip opinion, page 3899, line 1, replace "Olsen" with "Olson".

6. On slip opinion, page 3906, line 11, delete ", at least in theory".

7. On slip opinion, page 3906, line 15, replace "district judge" with "court."

8. On slip opinion, page 3907, line 1, replace "district judge" with "court".

9. On slip opinion, page 3907, line 8, insert "These principles of judicial review are no less true today than in the days of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (*upholding* district court injunction against state-wide initiative measure)."

10. On slip opinion page 3908, line 2, replace *"Lundgren"* with *"Lungren"*.

With these amendments, the panel has voted to deny Plaintiffs/Appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The motion of Mary Francis Berry, A. Leon Higginbotham, Yvonne Y. Lee and Cruz Reynoso for leave to file a letter brief joining in the request for rehearing en banc is DENIED as moot.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE COALITION FOR ECONOMIC EQUITY; CALIFORNIA NAACP; NORTHERN CALIFORNIA NAACP; CALIFORNIA LABOR FEDERATION; AFL-CIO; COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, CALIFORNIA; CHINESE AMERICAN CITIZENS' ALLIANCE; WOMEN CONSTRUCTION BUSINESS OWNERS AND EXECUTIVES, CALIFORNIA CHAPTER; UNITED MINORITY BUSINESS ENTREPRENEURS; CHINESE FOR AFFIRMATIVE ACTION; BLACK ADVOCATES IN STATE SERVICE; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; LA VOZ CHICANA; BLACK CHAMBER OF COMMERCE OF CALIFORNIA; MICHELE BENNETT; NANCY BURNS; FLOYD CHAVEZ; CHRISTOPHER CLAY; DANA CUNNINGHAM; IRAN CELESTE DAVILA; SHEVADE DOVE, nfr Melodie Dove; JESSICA LOPEZ; VIRGINIA MOSQUEDA;	)	Nos. 97-15030, 97-15031 D.C. No. CV-96-4024-TEH ORDER (Filed Aug. 26, 1997)

SALVADOR OCHOA; CLIFFORD TONG,

Plaintiffs/Appellees,

v.

PETE WILSON, Governor; DANIEL E. LUNGREN, Attorney General for the State of California; JOANNE CORDAY KOZBERG, Secretary of State and Consumer Services Agency and Cabinet Member; JAMES GOMEZ, Dir Dept of Corr,

Defendants/Appellants,

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor/ Appellant.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

Defendant City and County of San Francisco ("San Francisco"). Defendant County of Marin ("Marin"), and all Plaintiffs-Appellees, except California Labor Federation, (together called "Applicants") have filed emergency motions applying for a stay of the mandate in this case pending petition to the Supreme Court of the United States for writ of certiorari. Notwithstanding that San Francisco and Marin are not parties to the appeal, we grant them leave to file the emergency motions. Briefs in

opposition to the emergency motions were filed by Defendants-Appellants Pete Wilson, Governor, et al. (the "State"), and Defendant-Intervenor Californians Against Discrimination and Preferences, Inc. ("CADP").

We have take [sic] into consideration all of the filings and the relevant principles which apply to the decision of a court of appeals to grant a stay of its mandate, which, in this case, would be tantamount to extending the preliminary injunction entered by the district court on December 23, 1996, which we have already held rests on an erroneous legal premise. *See Netherland v. Tuggle*, 116 S. Ct. 4, 5 (1995) (vacating stay where court of appeals failed to apply required three-part test for granting stay) (citing *Barefoot v. Estelle*, 462 U.S. 880 (1983)); *see also Maggio v. Williams*, 464 U.S. 46, 48 (1983).

We are particularly mindful that:

1) A three judge panel of this court held that, as a matter of law, Proposition 209 does not violate the United States Constitution. The active judges of this court voted to leave that judgment undisturbed in rejecting the suggestion for rehearing en banc.

2) There is no inter-Circuit conflict on the law governing this case. *See* Supr.Ct.R. 10(a).

3) Applicants have failed to identify any other traditional criteria employed by the Supreme Court in granting certiorari. Notwithstanding their assertions, we are simply not persuaded that the decision conflicts with any decision of the Supreme Court. *See* Supr.Ct.R. 10(c).

Further, balancing the equities, we are persuaded that the State has demonstrated the clear possibility of

irreparable injury to its citizens if a stay of the mandate is granted; it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *see also Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994).

For the foregoing reasons, the emergency motions for stay of mandate pending petition to the Supreme Court for writ of certiorari are denied without prejudice to renewing such motions before the Supreme Court.

The mandate shall issue in the normal course, seven days after the date on which the order denying the petition for rehearing was entered.

APPENDIX E

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives – Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this title [42 USCS §§ 2000e et seq.] –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code [11 USCS §§ 1 et seq.], or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102) of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organizations) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered a local labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence

shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * *

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-

job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other

educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title [42 U.S.C. §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect

to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

* * *

§ 2000e-7. Effect on State laws

Nothing in this title [42 USCS §§ 2000e et seq.] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision

of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.].

* * *

§ 2000h-4. State authority

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of Sate law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

* * *

29 CFR § 1608.1. "The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII." § 1608.1(c)

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 42 – THE PUBLIC HEALTH AND WELFARE

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§ 31. Prohibition against affirmative action by public entities

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California anti-discrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Addition adopted by voters, Prop 209, effective November 6, 1996.

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE COALITION FOR ECONOMIC EQUITY; CALIFORNIA NAACP; NORTHERN CALIFORNIA NAACP; CALIFORNIA LABOR FEDERATION; AFL-CIO; COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, CALIFORNIA; CHINESE AMERICAN CITIZENS' ALLIANCE; WOMEN CONSTRUCTION BUSINESS OWNERS AND EXECUTIVES, CALIFORNIA CHAPTER; UNITED MINORITY BUSINESS ENTREPRENEURS; CHINESE FOR AFFIRMATIVE ACTION; BLACK ADVOCATES IN STATE SERVICE; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; LA VOZ CHICANA; BLACK CHAMBER OF COMMERCE OF CALIFORNIA; MICHELE BENNETT; NANCY BURNS; FLOYD CHAVEZ; CHRISTOPHER CLAY; DANA CUNNINGHAM; IRAN CELESTE DAVILA; SHEVADE DOVE, nfr Melodie Dove; JESSICA LOPEZ; VIRGINIA MOSQUEDA;	)	Nos. 97-15030, 97-15031 D.C. No. CV-96-4024-TEH ORDER (Filed Aug. 28, 1997)

SALVADOR OCHOA; CLIFFORD TONG,

Plaintiffs/Appellees,

v.

PETE WILSON, Governor; DANIEL E. LUNGREN, Attorney General for the State of California; JOANNE CORDAY KOZBERG, Secretary of State and Consumer Services Agency and Cabinet Member; JAMES GOMEZ, Dir Dept of Corr,

Defendants/Appellants.

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor/ Appellant.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

The clerk is directed to issue the mandate pursuant to Fed. R. App. P. 41(a).

The order filed August 21, 1997, rejecting the suggestion for rehearing en banc is amended to include the dissent from the denial of rehearing en banc of Judge Schroeder, in which Judge Pregerson, Judge Norris and Judge Tashima concur, the opinion of Judge Norris respecting the denial of rehearing en banc, in which Judge Schroeder, Judge Pregerson and Judge Tashima

concur, and the opinion of Judge Hawkins commenting on the denial of rehearing en banc. Judge Reinhardt was recused from this case and did not participate in the proceedings.

SCHROEDER, Circuit Judge, with whom PREGERSON, NORRIS and TASHIMA, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the court's decision not to review this case *en banc*. *En banc* review was warranted in this case for two reasons.

First, the case is extraordinarily important. In upholding the constitutionality of California Proposition 209, which forbids the state to offer any preferential treatment in employment, education, or contracting on the basis of race or gender, the case has put equal protection law in a state of turmoil. At stake is whether the voters may bar the state's institutions from using narrowly tailored race- or gender-based remedies which serve compelling state interests, including redressing the effects of past racial and gender-based discrimination by those very institutions.

Second, the decision is contrary to controlling Supreme Court precedent. Proposition 209 puts only race- or gender-based remedies for past discrimination, and no other state preferences, beyond the reach of the legislative or any other process, save another state initiative. The Supreme Court has squarely held that a state violates the Constitution when it attempts to put legislative remedies which benefit minorities at a remote level of government beyond the ordinary legislative process. *See*

Washington v. Seattle School District, No. 1, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

The panel opinion, *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997) ("*CEE II*"), treats the case as if the state were merely repealing past remedies that it had determined were not constitutionally required. *See id.* at 1443 (citing *Crawford v. Board of Educ.*, 458 U.S. 527, 538 (1982)). Proposition 209, however, is not merely a repeal of past remedies; it is a bar to future remedies to curb injustice. *See Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1508 (N.D.Cal. 1996) ("*CEE I*") ("Proposition 209, by its terms, not only repeals all existing state and local affirmative action programs, but also prohibits the adoption of such programs in the future. In so doing, Proposition 209 displaces authority with respect to a race and gender issue to 'a new and remote level of government,' and thus reorders the political process to the detriment of women and minorities.") (quoting *Seattle Sch. Dist.*, 458 U.S. at 483).

The panel is also incorrect when it characterizes the ordinance as "adopting the Equal Protection Clause." *CEE II*, 110 F.3d at 1446 (quoting *Crawford*, 458 U.S. at 535). Unlike the amendment in *Crawford*, Prop. 209 does not merely conform California law to the federal constitution. *See Crawford*, 458 U.S. at 535. Rather, it is specifically designed to bar remedies that are permissible under the Equal Protection Clause. *See CEE I*, 946 F.Supp. at 1489. Otherwise, the Proposition would be a nullity. *See id.*

The concept of judicial review is a constitutional check on the excesses of majority rule. *See Marbury v.*

Madison, 5 U.S. (1 Cranch) 137, 175-77 (1803); The Federalist No. 78 (Hamilton), at 466-70 (Clinton Rossiter ed., 1961). The responsible exercise of judicial review requires courage and vigilance. I would affirm District Judge Henderson's fine opinion in *CEE I*.

NORRIS, Circuit Judge, with whom SCHROEDER, PREGERSON and TASHIMA, Circuit Judges, join, respecting the denial of rehearing en banc:

In *Hunter v. Erickson*, 393 U.S. 385 (1969), Justice John Harlen stated a constitutional principle for the protection of racial minorities from discriminatory treatment within the political process. Justice Harlan wrote that "a provision that has the clear purpose of making it more difficult for racial . . . minorities to achieve legislation that is in their interest . . . is discriminatory on its face." *Id.* at 395 (Harlan, J., concurring). In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the full Court adopted Justice Harlan's reasoning, holding that whenever the state "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area [of government]," it has utilized an impermissible "racial classification" in restructuring the political process. *Id.* at 470, 480 (citing Justice Harlan's *Hunter* concurrence). It is the core holding of these cases that the state may not "place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 467, 483. Because that is precisely what Proposition 209 does, our court has no legitimate choice but to declare it unconstitutional. Unless and until the Supreme Court overrules *Hunter* and *Seattle*. California simply does not

have the constitutional authority to place minority groups at a disadvantage in the political process.

Proposition 209 strips the state legislature and all political subdivisions such as city councils, county boards of supervisors, local school boards, and the Board of Regents of the University of California, of all authority to adopt racial preference in the future. It "lodg[es] decisionmaking authority over [affirmative action] at a new and remote level of government" – the entire electorate of California. The measure thereby deprives the proponents of affirmative action – and only the proponents of affirmative action – of the ordinary benefits of representative government. The AARP can go to a city council tomorrow and request special incentives to attract older Americans to the municipal workforce; the VFW can lobby the state legislature for special employment or housing incentives on behalf of veterans; Marian Wright Edelman can lobby for preferential health benefits for children at all levels of state and local government. Advocates of racial preferences, in contrast, may no longer appeal to a city council or the Board of Regents, or even to the state legislature. They must take their case directly to the voters of California.

It is hard to imagine a more onerous burden in the political process than mounting a statewide initiative campaign. As the district court recognized, "substantial funds are required to organize and fund the statewide campaign" that is necessary to get an initiative passed. *See Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1498-99 (N.D. Cal. 1996). California has a population of some thirty-two million people. The cost of delivering a message to that entire electorate is staggering. The

Proposition 209 campaign itself cost over three million dollars, with most of the funds going to "television, radio, print advertising, and direct mail." *Id.* Proposition 209 now places that obstruction before every effort to enact affirmative action programs. It effectively shuts off all debate over racial preferences in the halls of representative government, depriving minorities even of the *opportunity* to persuade their elected and appointed officials that affirmative action programs make sense as a matter of social policy when they are narrowly tailored to achieve compelling remedial objectives.[1]

The *Coalition* panel does not dispute that affirmative action programs confer benefits primarily upon minorities, nor does it dispute that Proposition 209 places special obstacles in the way of those programs. "We accept without question," the panel writes, "the district court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." *Coalition for*

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[1] As the Supreme Court has made clear, a race-based preference program may be a constitutional means of remedying discrimination.

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.

Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995).

Economic Equity v. Wilson [CEE v. Wilson], 110 F.3d 1431, 1442 (9th Cir. 1997). Notwithstanding its recognition that Proposition 209 places special burdens on minority groups in the political process, the panel holds that the measure is constitutional. It reaches this result, I submit, in violation of its duty to follow controlling Supreme Court precedent.

I

The panel justifies its result by drawing a distinction between affirmative action programs and antidiscrimination laws that has no place in *Hunter-Seattle* analysis. It rationalizes this by characterizing all affirmative action programs as inherently discriminatory – even those that pass constitutional muster under the Fourteenth Amendment. The Equal Protection Clause is aimed at securing equality, the panel complains, and so affirmative action programs are not worthy of protection under the *Hunter-Seattle* doctrine because – in the panel's opinion – they do not secure "equal treatment." *CEE v. Wilson*, 110 F.3d at 1445. The panel uses its distinction to argue that *Hunter* and *Seattle* are categorically inapplicable to race-based preferences, and, in doing so, ignores the Supreme Court's clear mandate that *Hunter* and *Seattle* shall apply to *all* constitutional legislation that "inures primarily to the benefit of the minority." *Seattle*, 458 U.S. at 472.

In resting its decision on the view that affirmative action programs do not secure "equality," the panel injects into *Hunter-Seattle* analysis a test that looks to the personal views of individual judges about the relative

merits of affirmative action programs and antidiscrimination laws. There is absolutely no reason to believe that the Supreme Court intended any such result. The relevant inquiry under *Hunter* and *Seattle* is simply to ask whether legislation is *beneficial to minorities*. *See Hunter*, 393 U.S. at 392-93; *id.* at 395 (Harlan, J., concurring); *Seattle*, 458 U.S. at 472. The Court used language that is broad and unqualified. Nowhere has the Court suggested that the *Hunter-Seattle* doctrine permits judges to rely upon their own subjective impressions as to whether a particular measure aimed at benefiting minorities is also an effective means of securing equality, or whether the social costs associated with that measure are worth the potential benefits.

Indeed, the panel's distinction between antidiscrimination laws and race-based remedial programs is squarely rejected by *Seattle*. There, the Court followed *Hunter* in striking down a Washington statute that forbade local school districts from using busing to remedy de facto school segregation. Of course, the very busing program that gave rise to the case was itself a controversial, race-based remedial program. Under the Seattle busing plan, students were assigned to schools – and bussed accordingly – on the basis of their race. *See Seattle*, 458 U.S. at 461, 473-74. The *Seattle* Court held that this race-based remedial program was entitled to the same constitutional protection that the *Hunter* Court afforded to antidiscrimination laws. Both types of law were "beneficial" to minorities, and both hold a common goal: to "overcome the 'special condition' of prejudice" and remedy the injustices that have resulted from slavery and its legacy, racial discrimination. *See Seattle*, 458 U.S. at 486 (*quoting*

U.S. v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938)). The Court further held that the political controversy that enveloped the Seattle busing plan was not a proper factor for a court to consider in rendering a constitutional decision. Rather, it instructed, "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. *For present purposes, it is enough that minorities may consider busing for integration to be 'legislation that is in their interest.'* " *Seattle*, 458 U.S. at 474 (quoting Justice Harlan's concurrence in *Hunter*) (emphasis added).

The panel's distinction, in contrast, has the effect of transforming constitutional analysis into an arena for political debate over the "desirability and efficacy" of affirmative action. The panel "distinguishes" affirmative action programs, even though the panel agrees that such programs constitute legislation that is beneficial to minorities, because it thinks that affirmative action does not in fact promote "equality." It deploys the full rhetorical arsenal developed by the opponents of affirmative action, characterizing such programs as "inherently invidious" instances of reverse discrimination, *CEE v. Wilson*, 110 F.3d at 1445 n.16, and proclaiming that all affirmative action programs constitute disfavored legislation, whether or not they are constitutional. *See id.* at 1445. The *proponents* of affirmative action, responding on the level of social policy, would no doubt argue that such programs do in fact secure equality because they level the playing field by remedying the inequalities that are the product of the long history of state-sponsored discrimination that followed the Civil War. This is the rhetorical

framework within which the debate over affirmative action has unfolded in the halls of American government. As a political manifesto, the panel's opinion could comfortably assume a place on one side of that debate. As a document that purports to apply the Constitution as interpreted by the Supreme Court, however, the opinion fails at its appointed task.

The question of the constitutionality of Proposition 209 has nothing to do with the wisdom of affirmative action programs. The *Hunter-Seattle* doctrine does not call for judges to determine whether constitutionally permissible, beneficial programs are also wise and just means of securing equality. Rather, the "equality" that the *Hunter-Seattle* doctrine secures is the equality of *opportunity* that the Constitution guarantees to minority groups to use the channels of representative government to "achieve legislation that is in their interest." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

II

The panel offers a number of other, subsidiary arguments in its attempt to distinguish *Hunter* and *Seattle*. These arguments are no more convincing than the panel's attempt to inject a subjective "equality" test into the *Hunter-Seattle* doctrine.

A

The panel first appeals to the common-sense notion that legislatures should not be "constitutionally *required*"

by courts to pursue any particular legislative policy or program.

> To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

CEE v. Wilson, 110 F.3d at 1446.

As the panel must have understood, the district court did not hold that any particular legislation, including race-based preference programs, was "constitutionally required." The *Hunter-Seattle* doctrine does not *ask* whether any particular legislation is ever constitutionally required. The Supreme Court did not hold that either the antidiscrimination laws in *Hunter* or the remedial busing program in *Seattle* was constitutionally required. What the Court did hold is that states may not place political obstacles in the way of laws that favor minorities, nor may they remove such laws wholesale from the political process. All that is constitutionally required is that minorities have the *opportunity*, on equal terms, to seek "legislation in [their] behalf" within existing channels of government. *Hunter*, 393 U.S. at 392-93.

B

The panel next suggests that Proposition 209 does not implicate the *Hunter-Seattle* doctrine because, in fact, it does not selectively restructure the political process. The

panel argues that by forbidding race-related programs in employment, education, and contracting at *every* level of representative government – rather than doing so at only one level, as in *Seattle* – the State has "addresse[d] in neutral fashion race-related and gender-related matters" and so has not offended *Hunter* or *Seattle*. *CEE v. Wilson*, 110 F.3d at 1444.

Once again, the panel makes an argument that finds no support in law or reason. The *Hunter-Seattle* doctrine holds that it works an injury upon minorities to subject them to a structural disadvantage in the political process. It therefore forbids the State from "differentiat[ing] between the treatment of problems involving racial matters and that afforded other problems in the same area." *Seattle*, 458 U.S. at 480 (citations omitted). In *Seattle*, as the panel correctly observes, the State of Washington had inflicted this injury upon minorities at only one level of government: local school districts. What the panel suggests is that if the State inflicts a *Hunter-Seattle* injury at *every* level of representative government and "differentiates between the treatment of problems involving racial matters and that afforded other problems" in local school boards *and* city councils *and* the state legislature *and* state agencies such as the University of California Board of Regents, then the constitutional error is somehow cured. *See CEE v. Wilson*, 110 F.3d at 1443-44. Neither *Hunter* nor *Seattle* – nor common sense, for that matter – supports the proposition that *expanding* the levels at which the State

disadvantages minorities will render that action any less constitutionally suspect.[2]

C

Next the panel would have us believe that *Hunter* and *Seattle* are inapposite because Proposition 209 burdens *majority*, not minority, interests.[3] In putting forward this remarkable argument, the panel seizes upon a statement in *Hunter* that "[t]he majority needs no protection against discrimination." *Hunter*, 393 U.S. at 391; *CEE v. Wilson*, 110 F.3d at 1441. It then puts its own spin on the word "majority" by turning women and racial minorities into one undifferentiated "group." *See id.* at 1441-43. In other words, the panel transforms racial minorities into a numerical majority by lumping them together with

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[2] In making this extraordinary argument, the panel appears to rely exclusively upon language that it quotes out of context from a footnote in *Seattle* that discusses the distribution of authority between state and local governments in Washington. *See Seattle*, 458 U.S. at 479 n.22 ("We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally."); *CEE v. Wilson*, 110 F.3d at 1444. This attempt is unavailing. *Seattle* clearly held that "when the political process or the decisionmaking mechanism used to address racially conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the government action plainly rests on distinctions based on race." *Seattle*, 458 U.S. at 485-86.

[3] Even the Attorney General of the State of California, in defending Proposition 209, was not prepared to make this argument. It is advanced only by intervenor Californians Against Discrimination and Preferences, Inc. *See CEE v. Wilson*, 110 F.3d at 1441.

women. Presto! Proposition 209 burdens the interests of the majority, not the minority. To borrow the panel's (uncited) paraphrase of Justice Scalia, "if merely stating this alleged 'equal protection' [argument] does not suffice to refute it, our constitutional jurisprudence" has gone very far astray. *See id.* at 1439 (*quoting but not citing Romer v. Evans*, 116 S. Ct. 1620, 1630 (1995) (Scalia, J., dissenting)).[4]

D

Finally, the panel turns to *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982), in its attempt to distinguish *Hunter* and *Seattle*. *See CEE v. Wilson*, 110 F.3d at 1443, 1445-46. For the same reason that the *Hunter-Seattle* doctrine controls this case, however, *Crawford* has no bearing upon the constitutionality of Proposition 209.

Crawford's focus is on the difference between the "mere repeal" of existing, minority-oriented legislation and the systematic obstruction of such legislation in the future. It holds that a "mere repeal," unlike systematic

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[4] Curiously, after devoting three pages of its opinion to the enthusiastic development of the argument that Proposition 209 burdens majority, not minority, interests, the panel disclaims any reliance upon it, instead "accept[ing] without questioning the District Court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." *CEE v. Wilson*, 110 F.3d at 1441-43, 1442.

obstruction, does not violate equal protection. In *Crawford*, the people of California amended their Constitution to do away with a substantive right that the state's Equal Protection Clause had conferred above and beyond what was required by the Federal Constitution: the right to be free from de facto segregation in the public schools. The new amendment effectively repealed this right by rendering it unenforceable in state court. *See id.* at 529-35. In rejecting a *Hunter-Seattle* challenge to that amendment, the Supreme Court held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies." *Id.* at 538. Thus, *Crawford* permits the states to repeal any existing affirmative action programs, even though the repeal might operate to the detriment of minorities, so long as they do not *prospectively* disadvantage minorities in the political process.

Proposition 209, of course, is not a mere repeal of existing affirmative action programs. Had the initiative simply repealed all such programs throughout the state and left minority groups free to lobby the institutions of representative government for their reenactment, then *Crawford* might well control this case. Proposition 209 does much more, however: It forbids all institutions of representative government from enacting race- or gender-based affirmative action programs – and only those programs – *in the future*. A measure that places permanent political obstacles in the way of minority-oriented legislation violates the *Hunter-Seattle* doctrine and cannot fit itself within the "mere repeal" doctrine of *Crawford*.

III

When a federal court disregards Supreme Court precedent, it jeopardizes the foundation upon which the entire judiciary rests in our constitutional system of government. The power of the federal courts "lies . . . in [their] legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (Joint Opinion of O'Connor, Kennedy, and Souter, JJ.). Faithful adherence to precedent does not always come easily. "Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal." *Id.* at 867. Even the broad mantle of protection that Article III offers cannot completely shield federal judges from these heavy costs. We must sometimes implement precedent that comes into conflict with our most deeply held personal convictions. In those instances, for judges as much as anyone else, "[a]n extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms." *Id.* at 867-68. I would never minimize or belittle the burden that judges must bear when they are presented with a fundamental issue of conscience and called upon by binding Supreme Court precedent to render a decision whose substantive result violates their deeply held convictions.

It is the responsibility of *all* federal judges, however, to "struggle to accept [that burden]." *Id.* at 868. We must do so "because [we] respect the rule of law." *Id.* It is the

particular responsibility of the judges of lower federal courts, moreover, to abide by the precedent that binds us without regard to changes in the political climate of the Nation – or even changes in the sentiment of the Supreme Court – that we think might cast a favorable eye upon a different result. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Ouijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). The federal courts of appeals are neither final nor infallible,[5] and our duty is more constrained than we might sometimes wish it to be.

I submit, with all due respect, that the *Coalition* panel has neglected this duty in favor of a path of conservative judicial activism. Its failure to hold Proposition 209 unconstitutional on the authority of *Hunter* and *Seattle* is unsupportable as a matter of law. I deeply regret that a majority of our active judges – some, perhaps, assuming that the Supreme Court will correct the panel's error – has failed to vote to rehear this case en banc.

HAWKINS, Circuit Judge, commenting on the denial of rehearing en banc:

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[5] *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

The panel was faced with the task of filtering a citizen initiative through its understanding and interpretation of the Constitution. Apparently because the panel believed there was no recent authority directly on point, it chose to do what courts often must do: interpret and apply existing authority to the legal challenge presented. At the end of the day, that is the same task in which the district court was engaged. I have no doubt that both the district court and my colleagues on the panel acted in the utmost good faith in doing so. But therein lies an interesting and important question of jurisprudence. It has nothing to do with the merits of affirmative action; it has everything to do with the way in which courts subject to review by higher authority carry out their duties. It is about the proper role of an inferior court faced with contrary, but apparently controlling, precedent that is honestly and earnestly believes will not be followed (or will be distinguished) by higher authority. Is it the role (the duty, if you will) of a court in that circumstances to attempt to accurately predict what the higher authority will do? Or is its duty to faithfully follow existing precedent? If an inferior court in such a circumstance is free to predict what the higher court will do, then this panel probably got the issue right.[1] If, however,

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[1] For an analysis of the theory of predictionism, see Richard A. Posner, *The Problems of Jurisprudence* 221-28 (1990). For a case in which a circuit court engaged in such precedent-defying predictionism and was criticized by the Supreme Court for doing so, see *Rodriguez de Ouijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (Kennedy, J.), *aff'g Rodriguez de Ouijas v. Shearson/Lehman Bros.*, 845 F.2d 1296, 1298-99 (5th Cir. 1988).

the duty of a lower court is to faithfully apply existing authority, then I have seen no persuasive argument that contradicts Judge Norris' *Carolene Products-Hunter-Seattle* analysis.[2]

The Supreme Court may well tell us that this case is not governed by that line of authority or that an exception to the application of those cases should be made for this particular measure. Until that happens, it is not our role to predict – however accurate our predictions might turn out to be.[3]

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[2] Justice Stevens, dissenting in *Rodriguez*, described the Fifth Circuit's decision as "an indefensible brand of judicial activism." 490 U.S. at 486 (1989) (Stevens, J., dissenting).

[3] "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez*, 490 U.S. at 484 (Kennedy, J.). *Accord Agostini v. Felton*, ___ U.S. ___, 117 S. Ct. 1997, 2017 (1997) (O'Connor, J.).